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JUDICIAL RECUSAL: IT'S TIME TO TAKE ANOTHER LOOK POST - CAPERTON

*Justice Robert L. Brown, Retired**

I. INTRODUCTION

On occasion, Arkansas judges have attended public rallies in support of a particular cause or made a public statement in support of or in opposition to a hotly debated issue. A problem arises when a judge has that particular issue placed before him or her for a decision after the rally or public statement has occurred. Has that judge already prejudged the issue?

Closer to home, an Arkansas Circuit judge, Michael Maggio, pled guilty to federal bribery in early 2015.¹ The plea was based on substantial campaign donations that Maggio admitted were a bribe to rule a certain way on a remittitur motion in a nursing home case.² Maggio reduced the jury verdict by more than \$4 Million.³ No motion suggesting recusal had been filed before the plea was entered, but based on the campaign contributions and Maggio's plea, it appears one was warranted.

All of this comes on the heels of *Caperton v. A.T. Massey Coal Co.*⁴ In *Caperton*, the United States Supreme Court ruled that an appellate judge in West Virginia, Justice Brent Benjamin, should recuse in a case where he benefitted from enormous campaign contributions from the CEO of Massey Coal Company in a matter pending before that justice's court.⁵ Justice Benjamin refused to recuse, but ultimately the United States Supreme Court

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1. Gavin Lesnick, *Ex-Circuit Judge Maggio Pleads Guilty to Federal Bribery Count*, ARK. DEMOCRAT-GAZETTE, Jan. 9, 2015, <http://www.arkansasonline.com/news/2015/jan/09/ex-circuit-judge-maggio-pleads-guilty-federal-brib/>; see also Benjamin Hardy & Max Brantley, *Mike Maggio Pleads Guilty to Federal Bribery Charge*, ARK. BLOG (Jan. 9, 2015, 1:34 PM), <http://www.arktimes.com/ArkansasBlog/archives/2015/01/09/mike-maggio-pleads-guilty-to-federal-bribery-charge>.

2. Lesnick, *supra* note 1.

3. *Id.*

4. 556 U.S. 868 (2009).

5. *Id.* at 872.

required him to do so based on the plaintiff's due process rights under the United States Constitution.⁶

Justice Anthony Kennedy, however, in authoring the *Caperton* opinion, went further and remarked that states are free to impose more rigorous recusal standards for situations apart from what due process requires.⁷ The American Bar Association and several states took it as an invitation from the Court for the states to do exactly that.⁸

Looming large in the debate over when a judge should recuse is the whole notion of public confidence in even-handed justice. No one wants a judiciary where judges have been unduly influenced by factors outside of the courtroom.⁹ In an age where exorbitant amounts of money are spent on judicial campaigns and avenues for public comment by judicial candidates and sitting judges are readily available, an effective recusal procedure is vital to preserve public confidence in our judiciary.

This article will explore whether a change in Arkansas's recusal rules and procedures is needed to provide a neutral review of denied recusal decisions in order to enhance and preserve that public confidence.

II. ARKANSAS RECUSAL RULES AND PROCEDURES

Simply put, recusal is the removal of a judge, or the withdrawal from a position of judging, often arising from a conflict of interest or appearance of partiality.¹⁰ In Arkansas, certain rules and procedures govern recusal. Specifically, recusal in Arkansas is currently governed by rules and procedures pertaining to disqualification, public statements, and campaign contributions. The following sections will discuss each scenario of recusal in turn, beginning with disqualification.

6. *Id.* at 889–90.

7. *Id.* (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and states . . . remain free to impose more rigorous standards”) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

8. See ABA H. Res. 105C (2014) (adopted); ADAM SKAGGS & ANDREW SILVER, BRENNAN CENTER FOR JUSTICE, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM 9–10 (2011), http://www.brennancenter.org/sites/default/files/legacy/Democracy/Promoting_Fair_Courts_8.7.2011.pdf (listing nine states that have adopted rules addressing money on the campaign trail: Arizona, California, Iowa, Michigan, Missouri, New York, Oklahoma, Utah, and Washington).

9. Brennan Center for Justice, *Judicial Recusal Reform – Two Years After Caperton* (June 2, 2011), <https://www.brennancenter.org/analysis/judicial-recusal-reform-two-years-after-caperton> (discussing public polling and state reform efforts).

10. See, e.g., *Recusal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

A. Disqualification¹¹

In Arkansas, “a judge has the duty to hear cases unless there is a valid reason to disqualify.”¹² Moreover, a judge has traditionally retained the sole discretion to determine when he or she should recuse from hearing a case.¹³ And yet, when a motion to recuse is filed alleging more than conclusory allegations of bias supported by exhibits, affidavits, or depositions excerpts, an evidentiary hearing is necessary.¹⁴

When a judge decides not to recuse, the recourse for an offended party is limited. An emergency writ like prohibition or certiorari is not available since the decision to recuse is discretionary with the trial judge and an adequate remedy by appeal is available.¹⁵

The bar for success in a recusal appeal is set very high. To prevail, the wronged party must convince the appellate court that the trial judge abused his or her discretion and was biased to boot, which are daunting standards to meet.¹⁶ In addition, appellate courts in Arkansas presume impartiality on the part of the trial judge.¹⁷

The Arkansas Constitution, Arkansas statutes, and the Arkansas Code of Judicial Conduct help to determine when a judge must disqualify in a case. The Arkansas Constitution states the traditional grounds for disqualification:

No Justice or Judge shall preside or participate in any case in which he or she might be interested in the outcome, in which any party is related to him or her by consanguinity or affinity within such degree as prescribed by law, or in which he or she may have been counsel or have presided in any inferior court.¹⁸

11. Despite the technical differences between recusal and disqualification, the author will use the terms interchangeably. *See* ARK. CODE JUD. CONDUCT r. 2.11 cmt. 1.

12. *Porter v. Ark. Dept. of HHS*, 374 Ark. 177, 191, 286 S.W.3d 686, 697 (2008); *Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004).

13. *Perroni*, 358 Ark. at 24, 186 S.W.3d at 210.

14. *See, e.g., Ferren v. USAA Ins. Co.*, 2015 Ark. App. 477, at 4, 469 S.W.3d 805, 807.

15. *See generally* *Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

16. *Id.* at 3 (Appellant must demonstrate bias by a showing of objective bias or that there has been a communication of bias). *But see* *City of Rockport v. City of Malvern*, 2010 Ark. 449, at 12, 374 S.W.3d 660, 667 (Brown, J., concurring) (questioning the majority’s conclusion that Arkansas case law and judicial canons require recusal only when there is an objective showing of bias or a communication of bias, and instead suggesting that economic entanglement between a party and the judge, or anything else that may give rise to an appearance of impropriety, may force a recusal).

17. *Perroni*, 358 Ark. at 24, 186 S.W.3d at 210.

18. ARK. CONST. amend. 80, § 12.

The relevant Arkansas statute follows suit and provides essentially the same benchmarks for disqualification.¹⁹

The Arkansas Code of Judicial Conduct, which under the Arkansas Constitution is enforced by the Arkansas Judicial Discipline and Disability Commission, expands on these standards and focuses on whether the judge's words or conduct would cause his or her impartiality to "reasonably be questioned."²⁰ Embraced within the Arkansas Code of Judicial Conduct are some of the same standards for disqualification found in the Arkansas Constitution and state law, such as close familial relationships and prior representation in the case.²¹ But, in addition, personal bias in favor of or against a party or counsel is included as a ground for disqualification.²²

B. Public Statements

A judge's public statements may result in his or her disqualification. Rule 2.11 of the Arkansas Code of Judicial Conduct addresses statements by judges on public issues and mandates judicial disqualification when:

the judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.²³

Supplementing Rule 2.11 is Rule 4.1 relating to political campaigns, which reads judicial candidates "should consider the impact of their statements" on the perceptions of their impartiality before making such statements.²⁴ The comment to Rule 4.1 adds: "Public comments may require the judge to disqualify himself or herself when litigation involving those issues come before the judge."²⁵

The constitutional viability of judicial conduct rules like Rule 4.1 has been in doubt since 2002. That year the United States Supreme Court struck down the State of Minnesota's prohibition against a judge or judicial candidates announcing personal views on public issues during a judicial campaign.²⁶ The rule was held by the Court to have violated the candidate's free-speech rights under the First Amendment.²⁷ Justice Antonin Scalia, who

19. ARK. CODE ANN. § 16-13-214 (Repl. 2010).

20. ARK. CONST. amend. 64; ARK. CODE JUD. CONDUCT r. 2.3, 2.11.

21. ARK. CODE JUD. CONDUCT r. 2.11(A)(2), (6).

22. *Id.* r. 2.11 (A)(1).

23. *Id.* r. 2.11 (A)(5).

24. *Id.* r. 4.1 cmt. 13A.

25. *Id.*

26. *See generally* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

27. *Id.* at 788.

wrote for the majority, was particularly bold and vivid in his pronouncement that all judges have preconceived notions and opinions, the expression of which should not be limited by a state's judicial conduct rules.²⁸ In Justice Scalia's view, such biases should not disqualify judges when those voiced opinions are later litigated in a court of law.²⁹

The current Arkansas Code of Judicial Conduct rule (Rule 4.1) is different from its 2000 Minnesota counterpart in that it requires a judicial candidate merely to "consider" the impact of the judge's announced views on his or her role as judge rather than refrain from making the statements about those views altogether.³⁰ Additionally, the Comment 13A to Rule 4.1 references a motion to recuse as a remedy for a wronged litigant to use against the judge.³¹

Arkansas jurisprudence is sparse on the point of when a judge's prior public comments suggest prejudgment of the issue at hand. In 2000, the Arkansas Supreme Court in *Walls v. State* held that a judge's comments to a television reporter disagreeing with the supreme court's opinion reversing and remanding a rape case for resentencing in his court did not require the judge to recuse in the resentencing trial.³² More specifically, the court emphasized that appellant Walls had cited no authority that his due process rights were violated by the judge's failure to recuse.³³

Though not precisely premised on due process grounds, five years later the Arkansas Court of Appeals held that there was apparent bias when the judge, sitting as the trier of fact, announced before the decision was rendered that a shareholder would prevail in his claim of breach of contract against the corporation.³⁴ The appearance of prejudging the case, the court held, required recusal.³⁵ Federal courts of appeal have held similarly when a judge defends a certain position before the press in a pending case, prior to the time the final decision is made, thus exhibiting, according to these courts, a lack of impartiality.³⁶

28. *Id.* at 777 (claiming that it is "virtually impossible" to find judges who do not have preconceptions or opinions).

29. *Id.* at 778.

30. Compare ARK. CODE JUD. CONDUCT r. 4.1, with MINN. CODE JUD. CONDUCT, Canon 5(A)(3)(d)(i) (2000).

31. ARK. CODE JUD. CONDUCT r. 4.1 cmt. 13A.

32. *Walls v. State*, 341 Ark. 787, 792, 20 S.W.3d 322, 325 (2000).

33. *Id.* at 793, 20 S.W.3d at 325.

34. *Riverside Marine Remanufactures, Inc. v. Booth*, 93 Ark. App. 48, 53, 216 S.W.3d 611, 615 (2005).

35. *Id.* at 53, 216 S.W.3d at 615.

36. See, e.g., *In re Boston's Children First*, 244 F.3d 164, 171 (1st Cir. 2001); *U.S. v. Microsoft Corp.*, 253 F.3d 34, 411 (D.C. Cir. 2001); *U.S. v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993).

C. Campaign Contributions

Judicial impartiality is perceived to be most at risk, however, when a party or lawyer has recently made campaign contributions to the judge presiding over a case involving these contributors. The public clearly believes that campaign contributions have some impact on a judge's decision when a campaign contributor appears before that judge. According to one survey, 71% of Americans fully believe this.³⁷

It appears the public has a sound basis for such skepticism. In 2006, the New York Times reported that on the average, 70% of the time justices on the Ohio Supreme Court voted with their contributors in pending cases.³⁸ In the case of one justice, the percentage was 91%.³⁹

The frankness of the affected justices was also disarming. Justice Paul E. Pfeifer of the Ohio Supreme Court said: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."⁴⁰ He added: "Everyone interested in contributing has a very specific interest. . . . They mean to be buying a vote."⁴¹

In other states, supreme court justices have made similar comments about the impact of campaign contributions. Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals admitted, "It's pretty hard in big-money races not to take care of your friends It's very hard not to dance with the one who brung you."⁴² In a similar vein, Justice Otto Kaus of the California Supreme Court said, regarding the effect of money and politics on decision-making, "You cannot forget the fact that you have a crocodile in your bathtub."⁴³

In light of the public perception and these corresponding judicial admissions, confidence in a fair and impartial judiciary is at risk so long as elections requiring contributions, whether popular or retention elections, are in use. It has become more and more evident in recent years that judicial

37. JUSTICE AT STAKE, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS (2004), http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf.

38. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006, http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all&_r=0.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Erwin Chemerinsky & James J. Sample, *You Get the Judges You Pay For*, N.Y. TIMES, Apr. 17, 2011, <http://www.nytimes.com/2011/04/18/opinion/18sample.html>.

elections require significant amounts of money,⁴⁴ which can affect judicial independence as has already been illustrated.

Rule 4.4 of the Arkansas Code of Judicial Conduct attempts to confront this problem. It provides that judicial candidates may establish campaign committees to manage and conduct their campaigns, which includes soliciting and accepting contributions independent of the candidate within the time frame specified in the Code and then disclosing those contributions as the law requires.⁴⁵ One comment to Rule 4.4 reads:

To reduce potential disqualification and to avoid the appearance of impropriety, judicial candidates should, as much as possible, not be aware of those who have contributed to the campaign.⁴⁶

This comment may invoke a cynic's smirk, because contributions are a matter of public record. They are filed in the Arkansas Secretary of State's Office and are often published in the statewide newspaper as well.⁴⁷

Most recently, the United States Supreme Court upheld the State of Florida's prohibition against judicial candidates personally soliciting campaign donations but did not go so far as to require a candidate's complete lack of awareness of who the contributors were.⁴⁸ Specifically, the Court said in *Williams-Yulee v. Florida Bar Association* that it was permissible for judicial candidates under Florida law to thank their contributors for their donations.⁴⁹ While the Court subjected the Florida prohibition against direct solicitation to a strict scrutiny analysis and examined whether the state had a compelling state interest in such a prohibition, it distinguished a thank you note to contributors and noted that Florida was not required to include that in its prohibition.⁵⁰

The reality is that today money is an even more insidious hazard to public confidence in our judiciary. This is due in part to the *Citizens United v. FEC* decision in 2010, where the Court permitted unlimited campaign contributions by corporations and labor unions for the benefit of candidates, including judicial candidates, as part of their free-speech rights.⁵¹ In the af-

44. See, e.g., Barbara Peck, *Judicial Elections: Will They Destroy the Third Branch?*, THE OHIO STATE U. L. SCH. MAGAZINE (2008), <http://moritzlaw.osu.edu/all-rise/2008/05/judicial-elections/>; Henry Glass, *Justice for Sale? More Money Flowing to Judicial Elections*, THE CHRISTIAN SCI. MONITOR (Nov. 2, 2014), <http://www.csmonitor.com/USA/Justice/2014/1102/Justice-for-sale-More-money-flowing-to-judicial-elections>.

45. ARK. CODE JUD. CONDUCT r. 4.4.

46. *Id.* r. 4.4 cmt. 3A.

47. See ARK. CODE ANN. § 7-6-207 (2014).

48. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1669 (2015).

49. *Id.*

50. *Id.* The Court held that the prohibition against direct solicitation was narrowly tailored to serve a compelling state interest of assuring integrity in the judiciary. *Id.* at 1671.

51. *Citizens United v. FEC*, 558 U.S. 310 (2010).

termath of *Citizens United*, private watchdog procedures to determine whether judges have been the beneficiaries of substantial campaign contributions from either a litigant or a litigant's counsel have increasingly become critical factors in protecting judicial impartiality and independence.⁵² Arkansas provides a bit of an anomaly in that its Code of Judicial Conduct provides that judges should take pains not to know who their contributors are and the amounts.⁵³ Yet, at the same time, under *Caperton* and the Code itself, it appears to be incumbent upon our elected judges to know the extent of contributions for litigants and counsel appearing before them to address bias and due process concerns.

The solution to this dilemma would be for parties and counsel suggesting recusal to detail contributions from opposing litigants and counsel in the recusal motion for the targeted judge's initial consideration. Nevertheless, in light of *Caperton*, the recusal process itself needs clarification in many states, including Arkansas.

III. STATE RECUSAL REFORMS POST-CAPERTON

Commentators today are quick to point to recusal as the primary mechanism for protecting judicial impartiality and for assuring public confidence in its judiciary.⁵⁴ Much of this is due to Justice Kennedy's invitation to the states in the *Caperton* decision.⁵⁵

As already mentioned, in *Caperton*, one justice of the West Virginia Supreme Court, Justice Brent Benjamin, had refused to recuse from an appeal involving Massey Coal Company, after his campaign received the benefit of more than \$3 million from the CEO of that company.⁵⁶ Using an objective standard and the Due Process Clause, the United States Supreme Court found that there was a "serious, objective risk of actual bias" when Justice Benjamin participated in the Massey Coal Company decision and he must recuse.⁵⁷ The Court emphasized that recusal was not left to Justice Benjamin's discretion, but under these "extreme facts," the due process

52. See, e.g., The National Institute on Money in State Politics, which has as its mission the promotion of "an accountable democracy by compiling comprehensive campaign-donor, lobbyist, and other information from government disclosure agencies nationwide and making it freely available at FollowTheMoney.org."

53. ARK. CODE JUD. COND. r. 4.4 cmt. 3A.

54. See generally, Ben P. McGreevy, *Heeding the Message: Procedural Recusal Reform in Idaho After Caperton*, 46 IDAHO L. REV. 699 (2010); Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned*, 56 ARIZ. L. REV. 411 (2014); Charles R. Raley, *Judicial Independence in the Age of Runaway Campaign Spending*, 62 CASE W. RES. L. REV. 175 (2011).

55. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887–89 (2009).

56. *Id.* at 873–74.

57. *Id.* at 885–86.

rights of *Caperton* were implicated.⁵⁸ Section A will discuss the recusal rule remedies employed by states post-*Caperton*. Section B will discuss the potential remedies in Arkansas.

A. State Recusal Reforms

In the wake of Justice Kennedy's suggestion that the individual states adopt "more rigorous" recusal rules than the Due Process Clause requires,⁵⁹ the American Bar Association's House of Delegates in 2014 adopted a resolution urging the states to adopt (a) disqualification procedures which include prompt reviews should the challenged judge decline to recuse, and (b) disclosure requirements for campaign contributions.⁶⁰

With *Caperton* and the American Bar Association's Resolution as catalysts, many states have now experimented with various recusal reforms such as (a) a one-strike preemptory challenge to a sitting judge; (b) mandated recusal for significant campaign contributions by a litigant or attorney; and (c) a prompt, neutral review of a judge's decision not to recuse.⁶¹

1. *One-Strike Preemptory Challenge to a Sitting Judge*

Perhaps the most radical reform employed after *Caperton* is the one-strike preemptory challenge to a trial judge, where no stated cause for recusal is necessary and where the targeted judge is required to recuse. Several states have adopted this procedure and have even provided for a second challenge to the replacing judge for cause.⁶²

The obvious disadvantages of the preemptory challenge are the potential for forum shopping and for artificial delays. A litigant can merely dispose of the assigned judge to buy time and with the hope of a more favorable judge as the replacement.

2. *Mandated Recusal for Substantial Campaign Contribution by a Litigant or Attorney*

A second innovation that has gained momentum after *Caperton* is a rebuttable presumption that a judge should recuse if a judge received a certain

58. *Id.* at 886–88.

59. *Id.* at 889.

60. ABA H. Res. 105C (2014), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_105c.authcheckdam.pdf.

61. SKAGGS & SILVER, *supra* note 8, at 4–5, 9–10.

62. *See, e.g.*, CAL. CIV. PROC. CODE § 170.6 (West 2006 to Supp. 2011); MONT. CODE ANN. § 3-1-804 (2014); IDAHO CRIM. R. 25(a); IDAHO R. CIV. P. 40(d)(1); *see generally* McKoski, *supra* note 54.

sum of money as a campaign contribution from a litigant or litigant's attorney in the immediately preceding judicial election. The State of Alabama is one example.⁶³ Alabama uses a percentage of total contributions as the benchmark.⁶⁴ In addition, Alabama requires that if a judge receives a "substantial" campaign contribution from a litigant or litigant's attorney, close in time to the litigation, that judge must recuse.⁶⁵ Judges in Alabama must also file a list of contributors and contributions before taking office.⁶⁶

Not all contributions or knowledge of contributors should require recusal, according to the United States Supreme Court.⁶⁷ But, clearly, when the contribution is substantial and close in time to the case to be heard, one might reasonably question a judge's impartiality.⁶⁸

The disadvantages of a specific sum fixed by a state legislature requiring recusal, as in Alabama, are its arbitrariness and lack of flexibility as well as separation-of-powers concerns. Additionally, apart from a fixed sum, defining or delineating with specificity what constitutes a substantial contribution that could raise bias concerns is a Sisyphus-type task. Certainly, the amount of contribution, proximity to a trial, personal stake in the outcome, and the ratio of contribution at issue to total contributions would be factors, as they were in *Caperton*.⁶⁹ But, standing alone, what constitutes a "substantial" contribution as an objective standard is a vague and elusive concept that is not particularly helpful to a judge's recusal decision.

3. *Prompt, Neutral Review of Judge's Decision Not to Recuse*

The remedy that has the most traction in several states is a prompt review of a judge's decision not to recuse by a neutral judge or court. That review can take several forms.⁷⁰ Texas, for example, requires that neutral judges decide recusal motions.⁷¹ This comports with public opinion. According to a press release from Justice at Stake following a 2009 poll, 81% of the public surveyed believed that targeted judges should not decide motions petitioning them to recuse.⁷²

63. ALA. CODE § 12-24-3(b) (2015); *see also* CAL. CIV. PROC. CODE § 170.1 (West 2006 to Supp. 2011); MISS. CODE JUD. CONDUCT Canon 3E(2) (2002).

64. ALA. CODE § 12-24-3(b).

65. *Id.* § 12-24-2.

66. *Id.* § 12-24-3(a).

67. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1669 (2015).

68. ARK. CODE JUD. COND. r. 2.11 cmt. 4A.

69. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

70. SKAGGS & SILVER, *supra* note 8, at 4–5.

71. TEX. R. CIV. P. 18a(c) (West, Westlaw through 2011).

72. Press Release, Justice at Stake Campaign, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), <http://www.justiceatstake.org/newsroom/>

The State of Tennessee, however, provides for appellate review of denied-recusal decisions by its trial bench in its judicial conduct code.⁷³ The judge refusing to recuse, following a motion to do so accompanied by an affidavit, must enter an order stating his or her reasons for not recusing and any other pertinent information from the record for an immediate, interlocutory appeal to the Tennessee Court of Appeals, where that court will expedite and conduct a *de novo* review.⁷⁴ Ultimate review by the Tennessee Supreme Court is available.

This immediate review has the beauty of avoiding self-regulation of the recusal issue by the affected judge under a discretionary standard and, further, offers additional protection to the litigant by way of a fast and efficient decision by a neutral court. Flooding the Tennessee Supreme Court with recusal appeals, artificial delays, and forum shopping does not appear to be a problem according to Tennessee Court of Appeals Judge Frank Clement. Based on discussions with Judge Clement, Tennessee Judicial Conduct Rule 10B has worked well.⁷⁵ He is a self-described “fan of the rule” and is not aware of any dissatisfaction with it.⁷⁶ Over the past three fiscal years, there have been ten or less recusal appeals filed each fiscal year with a total of three appeals resulting in reversal.⁷⁷

B. Recusal Reform in Arkansas

What is the remedy in Arkansas when a supreme court justice refuses to recuse? There is no remedy, because recusal is discretionary and judges are not required to provide reasons for refusing to recuse. This is essentially the same procedure the United States Supreme Court employs. The State of Michigan has experimented with a rule where the supreme court would hear a justice’s denial of recusal on appeal and a majority of the court could demand a justice’s recusal under an appearance-of-impropriety standard.⁷⁸ The rule, however, has been criticized for enabling the majority to remove a duly

press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677.

73. TENN. SUP. CT. R. 10B (West, Westlaw through 2015).

74. *Id.*

75. Telephone Interview with Honorable Frank Clement, Judge, Tennessee Court of Appeals Judge (July 16, 2015).

76. *Id.*

77. Email from Tammy Hankins, Tennessee Administrative Office of the Courts, (July 25, 2015).

78. *See* Press Release, Justice at Stake Campaign, JAS Lauds New Judicial Rules in Michigan (Nov. 6, 2009), http://www.justiceatstake.org/newsroom/press_releases.cfm/jas_lauds_new_judicial_rules_in_michigan?show=news&newsID=6249; Mich. Ct. R. 200.3 (West, Westlaw through 2015).

elected justice from a case without a fair hearing.⁷⁹ The procedure for removing a supreme court justice from a case in Arkansas, no doubt, would be fraught with constitutional and policy considerations that are altogether different from the review of a trial judge's denied-recusal decision by a neutral court.

It would be prudent for the Arkansas Supreme Court to adopt a recusal rule similar to Tennessee Judicial Conduct Rule 10B for its trial judges. A neutral review of trial judges' non-recusal decisions would protect litigants' due process rights and avoid forum-shopping concerns that a one-strike peremptory challenge by a party presents. It would also offset the problems that arise from a judge's forced recusal for receiving a contribution of a certain dollar amount. In many instances, the dollar amount should not be the sole consideration, but other factors like proximity to trial, personal stake in the outcome, and ratio of that contribution to total contributions should be considered and be part of the recusal decision.

IV. CONCLUSION

The Arkansas Supreme Court would do well to consider recusal rule reform comparable to Tennessee Judicial Conduct Rule 10B for the trial bench. Public confidence in an impartial judiciary and an effective recusal procedure go hand in hand. Immediate reviews by a neutral tribunal like a court of appeals would allay suspicions of bias and provide an objective supplement to self-regulation by our judges. Moreover, such review of non-recusal decisions would avoid the pitfalls of peremptory challenges to our trial judges and forced recusal due to a certain contribution amount.

If an effective recusal process is indeed our best protection against the public's increasing fear of bias by our sitting judges, Arkansas should listen to the admonition of Justice Kennedy in *Caperton* and the American Bar Association and seek ways to enhance and improve our recusal procedures. Using Rule 10B in Tennessee as a guide would be a good starting point. Judges, litigants, attorneys, and the public at large would welcome this.

79. Matthew Schneider, *New Supreme Court Rules May Be Unconstitutional*, DETROIT NEWS, Dec. 22, 2009, <http://www.judicialnetwork.com/new-michigan-supreme-court-rules-may-be-unconstitutional/>.