RECUSE *ME?* *CAPERTON*, CAMPAIGN SPENDING AND DISQUALIFICATION OF JUDGES IN MICHIGAN

A saint would be hard-pressed to disregard the fact that one litigant gave them a huge donation while the other gave nothing. Most of our judges are not saints.

— Rudy Serra, Former District Judge, 36th District Court[1]

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I. INTRODUCTION

The 2009 U.S. Supreme Court decision in *Caperton v. A.T. Massey Coal Co.*[2] raised the profile of the electoral process by which most state judges, unlike federal judges, are chosen and the significant amounts of money that campaigning for judicial office entails. This Note examines the background behind that decision, and how the justices arrived at their decision, which effectively federalized state judges' decisions regarding their recusal from cases. It then discusses the process the Michigan Supreme Court undertook to codify its federal counterpart's holding in

1. E-mail from Rudy Serra, Former District Court Judge (June 10, 2009, 11:33 AM), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-Serra.pdf (last visited Feb. 7, 2011), at *1.

2. 129 S. Ct. 2252, 2256-57 (2009).

Caperton in the Michigan Court Rules. The Analysis section addresses why the court was justified in amending the rules, but also why it fell short of an opportunity to advance and clarify the law.

II. BACKGROUND

A. Caperton

In June 2009, in *Caperton v. A.T. Massey Coal Co.*,[3] the Supreme Court reversed the state of West Virginia's highest court on due process grounds, after one of the state's justices denied a recusal motion after receiving an exceptional amount of campaign support from one of the *Caperton* litigants in the justice's campaign for the court.[4] *Caperton* was not the first time the Supreme Court reviewed a state court decision on due process grounds, nor was it the first time the Court held that a state judge's failure to recuse himself violated the Fourteenth Amendment.[5] Rather, it was the first time the high court considered whether a litigant's activities relating to the judge's election can require the judge's recusal from a case involving that litigant.[6] The litigant's support of the judge *can* implicate the Due Process Clause,[7] as Justice Anthony Kennedy's opinion for the court explained:

> 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. 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

3. *Id.* at 2267.

4. *Id.* at 2257.

5. *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (holding that Prohibition Era process by which village mayor, sitting as local judge, tried alcohol-possession cases, where his salary was supplemented from an account whose funds derived from fines he imposed in court, and whose village's budget was also supplemented by fines he imposed in court, violated the accused's due process rights because of the judge-mayor's pecuniary interest in the outcome of the case); *see also* Ward v. Ohio, 409 U.S. 57, 59 (1972) (holding that accused's due process rights were implicated when a mayor-judge's salary was not affected by the case's outcome but the town's budget was); *see also In re* Murchison, 349 U.S. 133, 139 (1955) (holding that judge may not try a defendant for criminal contempt citation the judge himself issued).

6. *Caperton*, 129 S. Ct. at 2263-65.

7. *Id.* at 2267.

> election, and the apparent effect such contribution had on the outcome of the election.[8]

The story behind the court's decision in *Caperton* began in August 2002, when a West Virginia trial court found for Hugh Caperton and several others against Massey Coal and awarded the former $50 million in compensatory and punitive damages resulting from "misrepresentation, concealment, and tortious interference with existing contractual relations."[9] Subsequent to the decision, Massey Coal filed several unsuccessful motions with the trial court to overturn the verdict.[10] Then, the company's chief executive officer, Don Blankenship, involved himself in efforts to unseat Justice Warren McGraw of the five-member West Virginia Supreme Court of Appeals, which the litigants expected to hear the case on appeal.[11] Blankenship directly donated the maximum amount — $1,000 — to the campaign committee of McGraw's challenger, Brent Benjamin.[12] He then donated $2.5 million to "And For The Sake Of The Kids," a political organization that "opposed McGraw and supported Benjamin."[13] He further expended $500,000 "for direct mailings and letters soliciting donations as well as television and newspaper advertisements."[14]

> To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. . . . Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.[15]

Benjamin defeated McGraw and assumed McGraw's seat on the Supreme Court of Appeals.[16]

Prior to Massey Coal's appeal, "Caperton moved to disqualify now-Justice Benjamin", alleging a conflict of interest in light of

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8. *Id.* at 2263-64.
9. *Id.* at 2257.
10. *Id.*
11. *Id.*
12. *Caperton*, 129 S. Ct. at 2257.
13. *Id.*
14. *Id.*
15. *Id.* (internal citations omitted).
16. *Id.*

Blankenship's substantial support of Benjamin's election.[17] Benjamin denied the motion to recuse himself, finding "no objective information ... to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial."[18] The West Virginia Supreme Court of Appeals granted review of the trial-court's $50 million judgment against Massey Coal, reversed it, then granted reconsideration and again reversed the decision in Massey Coal's favor.[19] In both circumstances Justice Benjamin was part of a three-judge majority ruling in Massey Coal's favor.[20] Caperton and his co-plaintiffs petitioned the Supreme Court for a writ of certiorari, which the Court granted.[21]

In his opinion for the Court,[22] Justice Kennedy gave a brief history of the Court's recusal jurisprudence.[23] The earliest recusal case implicating the Due Process Clause involved a judge who had "a direct, personal, substantial, pecuniary interest" in the case's outcome.[24] More recently, the court has relaxed the standard, such that recusal is not limited to actual bias or a clear financial conflict of interest.[25] "The proper constitutional inquiry is 'whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[26] Thus, under an objective standard, the Fourteenth Amendment requires reversal where a judge's interest in the case's outcome "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[27]

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17. *Id.*

18. *Caperton*, 129 S. Ct. at 2257-58.

19. *Id.* at 2258-59.

20. *Id.* The circumstances of the motion for reconsideration are quite interesting, as they involved the recusal and substitution of the other two justices in the majority after the first hearing. *Id.* Justice Benjamin, as acting chief justice, selected temporary replacements for the disqualified justices. *Id.*

21. 129 S. Ct. 593 (2008).

22. The Court split along its traditional ideological lines in deciding *Caperton*. The four justices joining Kennedy were Stephen Breyer and Ruth Bader Ginsburg and the now-retired John Paul Stevens and David Souter. 129 S. Ct. at 2256. Chief Justice John Roberts wrote the lead dissent, which Justices Samuel Alito, Antonin Scalia and Clarence Thomas joined. *Id.* at 2256. Justice Scalia also wrote a separate, but brief, dissent. *Id.* at 2274-75.

23. *Caperton*, 129 S.Ct. at 2259-62.

24. *Id.* at 2259 (internal quotations omitted).

25. *Id.* at 2260-2261.

26. *Id.* at 2261 (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986)) (additional internal citations omitted).

27. *Id.* at 2263 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (emphasis added).

The circumstances in the case led the Supreme Court to reverse the West Virginia court, holding that the Due Process Clause required Justice Benjamin to recuse himself in light of his campaign support from Blankenship. It explained:

> Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion . . . In an election decided by fewer than 50,000 votes . . . Blankenship's campaign contributions — in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election — had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."[28]

B. The Michigan Supreme Court Addresses Recusal

Unlike federal judges — who, upon Senate confirmation,[29] receive lifetime appointment[30] — Michigan state judges, including state supreme court justices — are *elected*.[31]

Prior to a November 2009 amendment, the Michigan Court Rules outlined several grounds for a judge's recusal or disqualification.[32] The pre-2009 Rule 2.003 required a judge to recuse himself if he was "personally biased or prejudiced for or against a party or attorney,"[33] had knowledge of disputed evidentiary facts in the case,[34] worked on the case as an attorney,[35] or was employed or worked with a law firm or attorney in the case during the last two years.[36] In addition, the rule required a

28. *Id.* at 2264 (quoting *Withrow*, 421 U.S. at 47).

29. U.S. CONST. art. II, § 2, cl. 2.

30. U.S. CONST. art. III, § 1, cl. 1

31. MICH. CONST. art. VI. The provision relating to supreme court justices is Article VI, Section 2. Section 8 relates to judges of the courts of appeals, section 13 relates to circuit judges, and Section 16 relates to probate judges. The Michigan Supreme Court consists of seven justices. MICH. CONST. art. VI § 2. The justices choose one of their colleagues to serve as chief justice. MICH. CONST. art. VI, § 3.

32. MICH. CT. R. 2.003(B) (1995) (amended 2009).

33. MICH. CT. R. 2.003(B)(1) (1995) (amended 2009).

34. MICH. CT. R. 2.003(B)(2) (1995) (amended 2009).

35. MICH. CT. R. 2.003(B)(3) (1995) (amended 2009).

36. MICH. CT. R. 2.003(B)(4) (1995) (amended 2009).

judge to recuse himself if a spouse or close relative had an economic interest that could be impacted by the proceeding or by the outcome of the proceeding,[37] or where such a person was a party, attorney or likely material witness in the matter.[38]

The recusal procedures differ for supreme court judges and lower-court judges. When a party moves for the recusal of a trial or court of appeals judge, the challenged judge initially hears and rules on the motion to recuse herself.[39] If a judge denies the motion to recuse herself, the movant may appeal the decision to the chief judge of the court.[40] Where the court consists of only one judge, or when a party seeks the chief judge's recusal, the party may appeal to the state court administrator, "for assignment to another judge, who shall decide the motion de novo."[41] This process has not proven controversial. But until recently, there was no mechanism to appeal a supreme court justice's denial of a motion to recuse herself.[42]

To that end, the Supreme Court amended Rule 2.003 at a November 5, 2009, hearing.[43] One of the most important amendments was a major revision to the circumstances warranting recusal.[44] In addition to the traditional grounds already listed in Rule 2.003, a judge now must recuse himself when

> [t]he 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* . . . or (ii)

37. MICH. CT. R. 2.003(B)(5) (1995) (amended 2009).

38. MICH. CT. R. 2.003(B)(6) (1995) (amended 2009).

39. MICH. CT. R. 2.003(C)(3) (1995) (amended 2009).

40. MICH. CT. R. 2.003(C)(3)(a) (1995) (amended 2009).

41. MICH. CT. R. 2.003(C)(3)(b) (1995) (amended 2009).

42. The Michigan Supreme Court's practice thus mirrored that of the U.S. Supreme Court, which, "[i]n accordance with its historic practice," refers recusal motions to the challenged justice. Cheney v. U.S. Dist. Court, 540 U.S. 1217, 1217 (2004).

43. *Supreme Court Approves Recusal Standard*, GONGWER NEWS SERV.—MICH. (Nov. 5, 2009), http://www.gongwer.com/programming/news.cfm?date=11-5-2009; *Supreme Court Recusal Rules Adopted*, MICH. INFO. AND RESEARCH SERV. (Nov. 5, 2009), http://mirsnews.com/capsule.php?gid=3201#21915. The vote to adopt the amendments fell primarily on party lines. *Id.* Chief Justice Marilyn Kelly, along with Justices Michael Cavanagh and Diane Hathaway, all Democrats, joined Justice Elizabeth Weaver, a Republican, in supporting the amendments. *Id.* Justices Maura Corrigan, Robert Young Jr. and Stephen Markman voted against the amendment. *Id.*

44. *Id.*

has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.[45]

In adopting the rules, a news report paraphrased Justice Diane Hathaway as saying "the changes were needed in part to comply with [*Caperton*, which held that] in certain cases a judge's refusal to step down from a case can violate a party's due process rights, even if there is not evidence of actual bias."[46]

Another important change in Rule 2.003 is that parties may now *appeal* a justice's denial of recusal to the entire supreme court, which considers the motion de novo.[47] Prior to this amendment, a justice's denial of a recusal motion, unlike lower-court judges' denials of such motions, was unreviewable.[48] This particular change has been the subject of substantial criticism, as some attorneys — as well as three of the justices in the then-minority[49] — asserted that the amendment contravenes the state constitution, which provides that "[t]he supreme court shall not have the power to remove a judge."[50] Michigan Solicitor General Eric Restuccia, for example, had urged the court not to provide a means of appeal, explaining that "[granting] the authority to disqualify a fellow justice from reviewing a case has the same effect as removing that justice from that particular decision."[51]

The Court amended Rule 2.003 with the majority consisting of the three Democrats — Chief Justice Marilyn Kelly[52] and Justices Michael Cavanagh and Diane Hathaway — and Republican-turned-independent

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45. MICH. CT. R. 2.003(C)(1)(b).

46. *Supreme Court Approves Recusal Standard*, *supra* note 43.

47. MICH. CT. R. 2.003(D)(3)(b). The new rule also requires that a challenged justice, upon deciding a motion to recuse himself, must "publish his or her reasons about whether to participate." *Id.*

48. Michigan Supreme Court, Proposals Regarding Procedure for Disqualification of Supreme Court Justices, ADM File No. 2009-04 (March 18, 2009), http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-DQ-Order.pdf, at 24 (Corrigan, J., concurring).

49. *Supreme Court Recusal Rules Adopted*, *supra* note 43.

50. MICH. CONST. art. VI, § 4.

51. Letter from Eric Restuccia, Mich. Solicitor Gen., to Corbin Davis, Mich. Sup. Ct. Clerk (Sept. 1, 2009), http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-Restuccia.pdf (last visited Feb. 3, 2011). As solicitor general, Restuccia is subordinate to the attorney general.

52. As of Jan. 1, 2011, there are two judges with the surname of Kelly serving on the court — Democrat Marilyn Kelly and Republican Mary Beth Kelly. Unless the author otherwise states, all instances of the words "Justice Kelly" or "Chief Justice Kelly" refer to the Democratic, and not the Republican, justice.

Justice Elizabeth Weaver.[53] The minority of three Republican justices — Robert Young Jr., Maura Corrigan, and Stephen Markman — raised several objections foremost that the amended Rule 2.003 violates the state and federal constitutions.[54]

Justice Corrigan argued that the state constitution does not authorize disqualification of justices by any person other than the justice in question.[55] "Our constitution created a Supreme Court composed of seven elected or appointed justices," she began.[56] She then said that the law only authorizes removal of a justice in limited circumstances, such as impeachment by the house and conviction by the senate,[57] removal by two-thirds of each legislative chamber for "reasonable cause,"[58] or by a vote of the entire court only *after* recommendation of the Michigan Judicial Tenure Commission.[59] "The constitution provides no other authority for justices to remove one another. The majority's new rule falls within none of the express methods of removal set forth in our constitution."[60]

Justice Young was more emphatic.[61] He argued that the updated Rule 2.003 is an affront to democratic governance, emphasizing his contentions by bolding and italicizing substantial portions of his comments.[62] Justice Young said disqualifying a judge from a particular case is equivalent to the judge's removal from office, in contravention of the justice's due process rights.[63] Finally, he asserted that the newly amended rule violates a judicial candidate's First Amendment rights.[64] The new rule, in requiring disqualification based on the "appearance of

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53. Michigan Supreme Court, *Amendment of Rule 2.003 of the Michigan Court Rules*, ADM File No. 2009-04 (Nov. 25, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-112509.pdf, at 9 n.6.

54. *Id.* at 12-38.

55. *Id.* at 14 (Corrigan, J., dissenting).

56. *Id.*

57. *Id.* (citing MICH. CONST. art. II, § 7).

58. *Id.* (citing MICH. CONST. art. VI, § 25).

59. Michigan Supreme Court, *supra* note 53 (citing MICH. CONST. art. VI, § 30(2)).

60. *Id.*

61. *Id.* at 20-33 (Young, J. dissenting).

62. *Id.*

63. *Id.* at 21. Justice Young wrote:

> The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard.

64. *Id.* at 23.

impropriety,"[65] will have a "chilling effect" on free speech, Justice Young said.[66]

C. The New Recusal Rule Since Its Promulgation

Since the court promulgated its amendments to Rule 2.003 in 2010, judges and litigants invoked it over 100 times in late 2009 and during the course of 2010, according to this author's research.[67] Most of the time,

65. MICH. CT. R. 2.003(C)(1)(b)(ii).

66. Michigan Supreme Court, *supra* note 53 at 24 (Young, J., dissenting).

67. Cases involving Rule 2.003 as amended in November 2009:

Case	Justice	Reason for recusal
Univ. of Mich. Regents v. Titan Ins. Co., No. 136905, 2010 WL 4053915, at *5 (Mich. Oct. 15, 2010).	Davis	On court of appeals panel
People v. Hart, 791 N.W.2d 106, 107 (Mich. 2010).	Davis	On court of appeals panel
Midwest Bus Corp. v. Dep't of Treasury, 791 N.W.2d 283, 283 (Mich. 2010).	Davis	On court of appeals panel
In re Beck, No. 140842, 2010 WL 5154134, at *4 (Mich. Dec. 20, 2010).	Davis	On court of appeals panel
Schellenberg v. Bingham Twp., 791 N.W.2d 440, 440 (Mich. 2010).	Davis	On court of appeals panel
People v. Sanford, 791 N.W.2d 444, 444 (Mich. 2010).	Davis	On court of appeals panel
People v. Williams, 791 N.W.2d 445, 445 (Mich. 2010).	Davis	On court of appeals panel
People v. Mayes, 791 N.W.2d 446, 446 (Mich. 2010).	Davis	On court of appeals panel
People v. Pinder, 791 N.W.2d 461, 461 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Graham-Jones, 791 N.W.2d 461, 461 (Mich. 2010).	Davis	On court of appeals panel
People v. Fouts, 791 N.W.2d 464, 464 (Mich. 2010).	Davis	On court of appeals panel
People v. Winston, 774 N.W.2d 695, 695 (Mich. 2009).	Hathaway	Presiding trial court judge
People v. Anthony, 774 N.W.2d 924, 924 (Mich. 2009).	Hathaway	Presiding trial court judge
People v. Maddox El, 775 N.W.2d 789, 789 (Mich. 2009).	Hathaway	Presiding trial court judge
People v. Williams, 779 N.W.2d 819, 819 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Feliciano, 780 N.W.2d 254, 254 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Mitchell, 780 N.W.2d 264, 264 (Mich. 2010).	Hathaway	Presiding trial court judge

People v. McClain, 780 N.W.2d 790, 790 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Roque, 780 N.W.2d 800, 800 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Boykins, 780 N.W.2d 833, 833 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Hurt, 781 N.W.2d 818, 818 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Mead, 781 N.W.2d 823, 824 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Hodges, 781 N.W.2d 834, 834 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Tate, 781 N.W.2d 842, 842 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Tate, 782 N.W.2d 499, 499-500 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Bales, 783 N.W.2d 121, 121 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Hamilton, 783 N.W.2d 346, 346 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Tolson, 784 N.W.2d 217, 218 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Nettles, 784 N.W.2d 218, 218 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Montgomery, 784 N.W.2d 811, 811 (Mich. 2010).	Hathaway	Presiding trial court judge
People v. Briggs, 787 N.W.2d 110, 110 (Mich. 2010).	Davis	On court of appeals panel
People v. Jackson, 787 N.W.2d 113, 113 (Mich. 2010).	Davis	On court of appeals panel
People v. Thornton, 787 N.W.2d 114, 114 (Mich. 2010).	Davis	On court of appeals panel
People v. Frye, 787 N.W.2d 114, 114 (Mich. 2010).	Davis	On court of appeals panel
People v. Crosby, 787 N.W.2d 115, 115 (Mich. 2010).	Davis	On court of appeals panel
People v. Heise, 787 N.W.2d 116, 116 (Mich. 2010).	Davis	On court of appeals panel
People v. Holcomb, 787 N.W.2d 116, 116 (Mich. 2010).	Davis	On court of appeals panel
People v. Seymour, 787 N.W.2d 119, 119 (Mich. 2010).	Davis	On court of appeals panel
People v. Ray, 787 N.W.2d 120, 120 (Mich. 2010).	Davis	On court of appeals panel
Lyons v. Brady, 787 N.W.2d 120, 120 (Mich. 2010).	Davis	On court of appeals panel
People v. Hurd, 787 N.W.2d 123, 124 (Mich. 2010).	Davis	On court of appeals panel

People v. Williams, 787 N.W.2d 124, 124 (Mich. 2010).	Davis	On court of appeals panel
People v. Stephens, 787 N.W.2d 482, 482 (Mich. 2010).	Davis	On court of appeals panel
People v. Hampton, 787 N.W.2d 487, 488 (Mich. 2010).	Davis	On court of appeals panel
People v. Jakaj, 787 N.W.2d 489, 490 (Mich. 2010).	Davis	On court of appeals panel
People v. Payton, 787 N.W.2d 492, 493 (Mich. 2010).	Davis	On court of appeals panel
People v. Perreault, 787 N.W.2d 495, 495 (Mich. 2010).	Davis	On court of appeals panel
People v. Williams, 787 N.W.2d 496, 496 (Mich. 2010).	Davis	On court of appeals panel
People v. Noonan, 787 N.W.2d 497, 497 (Mich. 2010).	Davis	On court of appeals panel
People v. Buckner, 787 N.W.2d 498, 499 (Mich. 2010).	Davis	On court of appeals panel
Whitehorn v. Dep't of Corr., 787 N.W.2d 498, 498 (Mich. 2010).	Davis	On court of appeals panel
Sherr v. Twp. of W. Bloomfield, 787 N.W.2d 502, 502 (Mich. 2010).	Davis	On court of appeals panel
Dextrom v. Wexford Cnty., 787 N.W.2d 508, 508 (Mich. 2010).	Davis	On court of appeals panel
In re Kadzban, 788 N.W.2d 10, 10 (Mich. 2010).	Davis	On court of appeals panel
Pittman v. Bd. of Educ. of Wyoming Pub. Schs., 788 N.W.2d 10, 11 (Mich. 2010).	Davis	On court of appeals panel
People v. Hill, 788 N.W.2d 11, 12 (Mich. 2010).	Davis	On court of appeals panel
People v. Craig, 788 N.W.2d 13, 13 (Mich. 2010).	Davis	On court of appeals panel
People v. Adams, 788 N.W.2d 18, 18 (Mich. 2010).	Davis	On court of appeals panel
People v. Jordan, 788 N.W.2d 4, 4 (Mich. 2010).	Davis	On court of appeals panel
Daniels v. Petrosky-Clark, 788 N.W.2d 411, 412 (Mich. 2010).	Davis	On court of appeals panel
People v. Meade, 788 N.W.2d 418, 418 (Mich. 2010).	Hathaway	Trial judge
People v. Middlebrook, 788 N.W.2d 419, 419 (Mich. 2010).	Davis	On court of appeals panel
People v. Slaughter, 788 N.W.2d 425, 425 (Mich. 2010).	Davis	On court of appeals panel
People v. Bean, 788 N.W.2d 426, 426 (Mich. 2010).	Davis	On court of appeals panel
People v. Ball, 788 N.W.2d 439, 439 (Mich. 2010).	Davis	On court of appeals panel

Schellenberg v. Bingham Twp., 788 N.W.2d 441, 442 (Mich. 2010).	Davis	On court of appeals panel
People v. Tolbert, 788 N.W.2d 447, 448 (Mich. 2010).	Davis	On court of appeals panel
People v. Wheeler, 788 N.W.2d 451, 451 (Mich. 2010).	Davis	On court of appeals panel
People v. Cole, 788 N.W.2d 452, 452 (Mich. 2010).	Davis	On court of appeals panel
People v. Hall, 788 N.W.2d 456, 456 (Mich. 2010).	Davis	On court of appeals panel
People v. Spacher, 788 N.W.2d 456, 457 (Mich. 2010).	Davis	On court of appeals panel
Wirth v. Amsted Indus., 788 N.W.2d 459, 459 (Mich. 2010).	Davis	On court of appeals panel
People v. Mitchell, 788 N.W.2d 5, 5 (Mich. 2010).	Davis	On court of appeals panel
Cnty. Rd. Ass'n of Mich. v. Governor of State, 788 N.W.2d 663, 664 (Mich. 2010).	Davis	On court of appeals panel
Progressive Mich. Ins. Co. v. Sneden, 788 N.W.2d 666, 667 (Mich. 2010).	Davis	On court of appeals panel
Blue Lake Fine Arts Camp v. Blue Lake Twp. Zoning Bd. of Appeals, 788 N.W.2d 672, 672 (Mich. 2010).	Davis	On court of appeals panel
People v. Holloway, 788 N.W.2d 674, 674 (Mich. 2010).	Davis	On court of appeals panel
People v. Gillis, 788 N.W.2d 674, 675 (Mich. 2010).	Davis	On court of appeals panel
Williams v. City of Detroit, 788 N.W.2d 675, 677 (Mich. 2010).	Davis	On court of appeals panel
Dillard v. Farm Bureau Gen. Ins., 788 N.W.2d 8, 8 (Mich. 2010).	Davis	On court of appeals panel
Mackie v. Bollore S.A., 788 N.W.2d 8, 8 (Mich. 2010).	Davis	On court of appeals panel
Kyser v. Kasson Twp., 788 N.W.2d 9, 9 (Mich. 2010).	Davis	On court of appeals panel
Singer v. Sreenivasan, 789 N.W.2d 173, 173 (Mich. 2010).	Davis	On court of appeals panel
People v. Sparks, 789 N.W.2d 176, 176 (Mich. 2010).	Davis	On court of appeals panel
People v. Spicer, 789 N.W.2d 438, 438 (Mich. 2010).	Davis	On court of appeals panel
Velez v. Tuma, 789 N.W.2d 440, 440 (Mich. 2010).	Davis	On court of appeals panel
Madley v. Centex Real Estate Corp., 789 N.W.2d 447, 447 (Mich. 2010).	Davis	On court of appeals panel
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People v. Hankins, 789 N.W.2d 463, 464 (Mich. 2010).	Davis	On court of appeals panel
Yohn v. Univ. of Mich. Regents, 789 N.W.2d 465, 465 (Mich. 2010).	Davis	On court of appeals panel
People v. Coleman, 789 N.W.2d 473, 473 (Mich. 2010).	Davis	On court of appeals panel
Brown v. Dep't of Corr., 789 N.W.2d 477, 477 (Mich. 2010).	Davis	On court of appeals panel
People v. Lott, 789 N.W.2d 477, 477 (Mich. 2010).	Davis	On court of appeals panel
People v. Pope, 789 N.W.2d 478, 478 (Mich. 2010).	Davis	On court of appeals panel
People v. Etherton, 789 N.W.2d 478, 478 (Mich. 2010).	Davis	On court of appeals panel
People v. Turner, 789 N.W.2d 479, 479 (Mich. 2010).	Davis	On court of appeals panel
People v. Nash, 789 N.W.2d 481, 481 (Mich. 2010).	Davis	On court of appeals panel
Paquette v. State Farm Mut. Auto Ins. Co., 789 N.W.2d 486, 487 (Mich. 2010).	Davis	On court of appeals panel
People v. Lee, 789 N.W.2d 664, 664 (Mich. 2010).	Davis	On court of appeals panel
People v. Houthoofd, 790 N.W.2d 339, 340 (Mich. 2010).	Davis	On court of appeals panel
Hoffman v. Barrett, 790 N.W.2d 394, 394 (Mich. 2010).	Davis	On court of appeals panel
People v. Regains, 790 N.W.2d 396, 396 (Mich. 2010).	Davis	On court of appeals panel
Joseph Chevrolet, Inc. v. Hunt, 790 N.W.2d 404, 404 (Mich. 2010).	Davis	On court of appeals panel
People v. Vermett, 790 N.W.2d 405, 405 (Mich. 2010).	Davis	On court of appeals panel
People v. Malone, 790 N.W.2d 675, 675 (Mich. 2010).	Davis	On court of appeals panel
In re Kadzban, 790 N.W.2d 679, 679 (Mich. 2010).	Davis	On court of appeals panel
Tucker v. Capital Area Transp. Auth., 790 N.W.2d 679, 679 (Mich. 2010).	Davis	On court of appeals panel
People v. Resor, 790 N.W.2d 683, 683 (Mich. 2010).	Davis	On court of appeals panel
Hall v. Cohen, 790 N.W.2d 684, 685 (Mich. 2010).	Davis	On court of appeals panel
People v. Vasquez, 790 N.W.2d 685, 686 (Mich. 2010).	Davis	On court of appeals panel
People v. Likine, 790 N.W.2d 689, 689 (Mich. 2010).	Davis	On court of appeals panel

the recusals involved a justice voluntarily disqualifying him or herself on account of having heard the case while serving on a lower court — Justice Davis on the court of appeals and Justice Hathaway on the Wayne County Circuit Court. In one case, *Brady v. Attorney Grievance Commission*,[68] Justice Weaver recused herself because she had *ex parte* conversations with one of the lawyers in the case.[69]

Only a handful of cases involved a justice, on the motion of one of the parties, refusing to recuse him or herself. Of those cases in which a party invoked Rule 2.003(d)(3)(b) to bring the matter to the entire court, none resulted in the court overruling the challenged justice and ordering his or her recusal. Other than the cases discussed below, the only other development of significance regarding recusal of the justices during the one-year period following the amended rules promulgation occurred in March 2010, when the court made additional amendments to Rule 2.003 limited to the time for filing motions to disqualify.[70]

People v. Harris, 790 N.W.2d 689, 691 (Mich. 2010).	Davis	On court of appeals panel
Hlywa v. Liberty Park of Am., 790 N.W.2d 818, 818 (Mich. 2010).	Davis	On court of appeals panel
Moody v. Lawson, 790 N.W.2d 825, 825 (Mich. 2010).	Davis	On court of appeals panel
Neci v. Steel, 790 N.W.2d 828, 828 (Mich. 2010).	Davis	On court of appeals panel
Smith v. Anonymous Joint Enter., 793 N.W.2d 559, 560 (Mich. 2010).	Davis	On court of appeals panel
Brady v. Attorney Grievance Comm'n, 793N.W.2d 398, 398 (Mich. 2010).	Weaver	Met with attorney in case, concerned with appearances
Graves v. State Farm Mut. Ins. Co., 791 N.W.2d 111, 112 (Mich. 2010).	Davis	On court of appeals panel
McCue v. Dep't of Transp., 791 N.W.2d 107, 107 (Mich. 2010).	Davis	On court of appeals panel
Samel v. Parole Bd.,789 N.W.2d 667, 667 (Mich. 2010).	Davis	On court of appeals panel
People v. Soares,789 N.W.2d 854, 855 (Mich. 2010).	Davis	On court of appeals panel

68. 793 N.W.2d 997 (Mich. 2010)

69. *Id.* at 398-405.

70. Amendment of Rule 2.003 of the Michigan Court Rules ADM File No. 2009-04 (Mich. Sup. Ct., Mar. 16, 2010) (amending MICH. CT. R. 2.003(D)(1)(a)-(d) (West, Westlaw through June 2010 amendments), *available at* http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-03-16-10.pdf.

1. Pellegrino v. AMPCO Systems Parking

Plaintiff Anthony Pellegrino and his wife were passengers on an airport shuttle van, which swerved on ice and struck a concrete barrier, killing his wife and injuring plaintiff.[71] The defendant van operator conceded liability, and the case went to trial for the sole purpose of determining damages.[72] After a jury trial, a Wayne County circuit judge issued a judgment of $14.9 million in Pellegrino's favor.[73] The court of appeals affirmed.[74] The issue on appeal was whether the trial court's denial of defense counsel's use of peremptory challenges to achieve a racially balanced jury violated defendant's rights under the U.S. Supreme Court's holding in *Batson v. Kentucky*.[75]

Before the Supreme Court heard the case on oral argument, plaintiff's counsel, Geoffrey Fieger, a prominent attorney and onetime Democratic nominee for governor, moved to disqualify the Republican members of the court at the time — Justices Markman, Corrigan and Young — arguing they were biased against him.[76] Justice Markman, in denying the motion, began by explaining that he was "personally convinced that [he could] fairly and impartially consider the present appeal."[77] He continued:

> [C]ounsel has prevailed in those cases in which, in my judgment, the law was on his side, and he has not prevailed in those cases in which, in my judgment, the law was not on his side, and I have set forth my analyses in the opinions of this Court with a thoroughness equivalent to that of other justices. Although I do not believe that votes that I have cast in counsel's favor dispositively evidence lack of bias and prejudice any more than do votes cast in opposition evidence bias or prejudice—for impartiality is not determined by a judge's 'batting average' in cases involving particular attorneys or parties—it does seem

71. Pellegrino v. AMPCO Sys. Parking, 785 N.W.2d 45, 48 (Mich. 2010).

72. *Id.*

73. *Id.*

74. No. 274743, 2008 WL 2185211 (Mich. Ct. App. May 27, 2008) (not reported).

75. 476 U.S. 79 (1986). In reversing, Justice Markman, writing for a court majority over the dissents of Justices Weaver and Hathaway, held that "such a denial violates the rule of *Batson* that jurors must be 'indifferently chosen' and is therefore in violation of both the equal protection guarantees of the federal and state constitutions[.] Decisions to include, and to exclude, particular jurors must be undertaken without consideration of race." *Pellegrino*, 785 N.W.2d at 48 (internal citation omitted).

76. 778 N.W.2d 69, 70 (Mich. 2010).

77. *Id.*

> highly relevant that I have ruled in counsel's favor in cases in which he represented others, in cases in which he himself was a malpractice defendant, and in cases in which he himself was the subject of an attorney grievance investigation.[78] Justice Markman distinguished the then-instant case from a previous Fieger suit in which he granted a motion disqualifying himself, where Fieger "was the named plaintiff, because that case pertained to an Attorney General's investigation of counsel's financial conduct undertaken in connection with [Justice Markman's] judicial reelection campaign in 2004."[79] Whereas Fieger alleged bias on the part of the Republican justices due to his efforts over the years to stymie their reelection efforts, Justice Markman rejected Fieger's as well as his own past statements as grounds for his disqualification.[80] He wrote:
>
> Mr. Fieger himself contributed substantial amounts of money in opposition to our campaigns while also being highly vocal in his political opposition . . . 'A highly visible and outspoken public figure, who is an integral part of the political opposition to a judicial candidate, cannot be insulated from mention, or even criticism, in a judicial campaign because he also happens to be a lawyer."[81]

Justice Young's statement denying the motion echoed that of Justice Markman:

> While counsel's political life outside the courtroom has relevance in that realm, it has no bearing on my consideration of his or his clients' legal matters. Counsel's clients are entitled to justice under law, no more or less. I have previously and will continue to entertain the arguments counsel makes on behalf of his clients with due regard to their merits under law. As explained in the brief opposing the motion for disqualification, some of my decisions in cases involving plaintiff's counsel have

78. *Id.*

79. *Id.* at 71 (citing Fieger v. Cox, 737 N.W.2d 768 (Mich. 2007)).

80. *Id.*

81. *Id.* at 71-72 (quoting Grievance Adm'r v. Fieger, 719 N.W.2d 123, 147 (Mich. 2006)).

> been favorable to counsel's position, while others have not been favorable, as the merits of each case required.[82]

Fieger then moved for the entire court to consider the disqualification of Justices Corrigan, Markman and Young.[83] The court denied the motion in January 2010.[84] Chief Justice Kelly wrote that "Justice Markman's voting pattern over the past decade does not reflect bias against Mr. Fieger or the appearance of bias."[85]

However, in a joint concurrence denying disqualification, Justices Hathaway and Weaver suggested that they intended to vigorously enforce Rule 2.003 in the future:

> Under our newly revised rule MCR 2.003, appearance of impropriety is a ground for judicial disqualification. The statements made by Justice Markman were made before this Court adopted MCR 2.003 as amended. We will not apply the appearance-of-impropriety standard retroactively to statements made by a justice concerning a party or a party's attorney prior to the rule's amendment. However, we will apply the standard prospectively to statements made by a justice concerning a party or a party's attorney from the date that the order amending MCR 2.003 was entered. Accordingly, as the appearance-of-impropriety standard was not yet in effect, we will not apply the amended rule to the statements made by Justice Markman.[86]

Citing the U.S. Supreme Court case of *Republican Party of Minnesota v. White*,[87] these two justices wrote that while judges have First Amendment rights, "a justice does not have a protected right to decide a case in which he or she made campaign statements that create an appearance of impropriety."[88] The justices continued: "Consequently, in the future, for conduct or statements that occur after the effective date of MCR 2.003 as amended, we will apply the appearance of impropriety standard as a ground for disqualification."[89] For the next sixty pages, the justices then engaged in a passionate debate about the constitutionality of

82. 789 N.W.2d 777, 805 (Mich. 2010) (internal footnotes omitted).
83. *Id.* at 777.
84. 777 N.W.2d 144 (Mich. 2010).
85. *Id.* at 144-45 (Kelly, C.J., concurring).
86. *Id.* at 145 (Weaver and Hathaway, J.J., concurring).
87. 536 U.S. 765 (2002),
88. *Pellegrino*, 777 N.W.2d at 145.
89. *Id.*

Rule 2.003, returning to many of the same arguments they raised during its promulgation in 2009.[90]

2. The Dumas and Miller Cases

In *Dumas v. Auto Club Insurance Association*, appellee and attorney Sheldon Miller had donated the statutory maximum of $3,400[91] to then-Chief Justice Kelly's campaign committee in 2004.[92] Justice Kelly denied appellants' motion to disqualify herself, concluding that the $3,400 represented a "de minimis portion of the total amount raised by my campaign committee in 2004: less than one-half of one percent. This small amount does not create an objective appearance of impropriety."[93] The chief justice then distinguished the circumstances of Miller's donation from that of Massey Coal chief Don Blankenship's donation in *Caperton*, explaining that "given the obvious difference in size between the contribution at issue in *Caperton* [$3.5 million] and Miller's contribution here, one could not reasonably analogize the two cases."[94]

Earlier in the year, Chief Justice Kelly refused to recuse herself in a related case on account of the same contribution from Miller, holding that the petitioner, the state's attorney grievance administrator, had not filed his motion for recusal within the time limits Rule 2.003 prescribes.[95] For his part, Justice Young voluntarily disqualified himself from consideration of these appeals, as he had served as general counsel to one of the litigants — the Auto Club — during earlier litigation.[96]

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90. *Id.* at 777-852.

91. MICH. COMP. LAWS § 169.252(1)(a) (West 2005).

92. Dumas v. Auto Club Ins. Ass'n, 789 N.W.2d 444, 445 (Mich. 2010).

93. *Id.* (internal footnote omitted).

94. *Id.*

95. Grievance Adm'r v. Miller, 782 N.W.2d 774, 775 (Mich. 2010). The rule provides:

> (c) Time for Filing in the Supreme Court. If an appellant is aware of grounds for disqualification of a justice, the appellant must file a motion to disqualify with the application for leave to appeal. All other motions must be filed within 28 days after the filing of the application for leave to appeal or within 28 days of the discovery of the grounds for disqualification. If a party discovers the grounds for disqualification within 28 days of a scheduled oral argument or argument on the application for leave to appeal, the motion must be made forthwith.

MICH. CT. R. 2.003(D)(1)(c) (West 2010). .

96. Grievance Adm'r v. Miller, 788 N.W.2d 458 (Mich. 2010).

3. People v. Aceval

Alexander Aceval pled guilty to a charge of possession with intent to deliver more than 1,000 grams of cocaine, but then reversed course and appealed his conviction.[97] The court of appeals affirmed.[98] Over the dissents of Justice Markman and then-Chief Justice Kelly, the Supreme Court denied leave to appeal.[99] Aceval petitioned for rehearing and simultaneously moved for Justice Hathaway's recusal.[100] Justice Hathaway characterized the recusal motion as follows:

> Defendant[] ... generally asserts that I am actually biased against him and/or that there is an appearance of impropriety presented by my participation in this case given the applicable facts and circumstances. Defendant's accompanying affidavit ostensibly setting forth the grounds and factual basis for disqualification is difficult to decipher and almost incoherent. As best as I can determine, defendant is basing this motion on unsubstantiated assertions and opinions of his counsel to the effect that there is widespread corruption and/or cronyism throughout the entire Wayne County Circuit Court and the Wayne County Prosecutor's Office. However, defendant fails to set forth any facts that would support these personal opinions. Aside from defendant's frivolous insult to the integrity of the entire Third Circuit Bench and Prosecutor's Office, he has alleged nothing to suggest that I am personally biased or that there is any appearance of impropriety.[101]

Justice Hathaway began her analysis by declaring that she bore no actual bias toward the defendant: "I am not personally acquainted with defendant, or counsel for the defendant, and accordingly harbor no bias or prejudice against either of them."[102] She then considered whether her status as a former judge on the Wayne County Circuit Court, the situs of defendant's trial, "'would create in reasonable minds a perception that [her] ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'"[103] She dismissed this

97. People v. Aceval, 781 N.W.2d 779, 780 (Mich. 2010).
98. 764 N.W.2d 285 (Mich. Ct. App. 2009).
99. 772 N.W.2d 54 (Mich. 2009).
100. *Aceval*, 781 N.W.2d at 780.
101. *Id.*
102. *Id.* at 780-81.
103. *Id.* at 781 (quoting *Caperton*, 129 S. Ct. at 2255).

argument, explaining that "Justices of the Supreme Court and Judges of the Court of Appeals who have previously served on a trial bench must routinely review their former colleagues' decisions and actions. ... There is no appearance of impropriety in doing so and defendant cites no authority to support such a proposition."[104] Justice Hathaway continued:

> Defendant's challenge to my ability to be impartial in this appeal is also based on the unsupportable and fictitious premise that there is widespread corruption and cronyism among Wayne County judges and prosecutors. This bold assertion is supported only by numerous disjointed and bizarre allegations and opinions of his counsel.[105]

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104. *Id.*

105. *Id.* In all fairness, the *Aceval* case was a rather embarrassing affair for all involved. Wayne County prosecutors charged Aceval with possession with intent to deliver 1,000 or more grams of cocaine and conspiracy to commit same. 764 N.W.2d 285, 289 (Mich. Ct. App. 2009). Defense counsel sought to compel prosecutors to produce a confidential informant who assisted in the sting operation resulting in Aceval's arrest. *Id.* In June 2005, the trial judge, Mary Waterstone of the Wayne County Circuit Court, held an in camera interview of the lead investigating officer, Robert McArthur, who revealed the informant's identity and disclosed that the officers were paying the informant for his services. *Id.* At a later hearing in September, another officer on the case, Scott Rechtzigel, lied when he testified he had never met the informant before the day of Aceval's arrest. *Id.* Then at a subsequent in camera session between Judge Waterstone and the prosecutor:

> [T]he prosecutor admitted that she knew that Rechtzigel had knowingly committed perjury but stated that she 'let the perjury happen' because 'I thought an objection would telegraph who the CI is.' In response, the judge stated that she thought 'it was appropriate for [the witness] to do that.' Further, the court added, 'I think the CI is in grave danger.... I'm very concerned about his identity being found out.'

Id. When the case went to trial, the informant, Chad Povish, also perjured himself while testifying, asserting that he had never met Officers Rechtzigel and McArthur before the date of Aceval's March 2005 arrest and that the officers did not offer him any deals. *Id.* The prosecutors and the judge did nothing to stop or correct the perjury, ostensibly to protect Povish's role as an informant. *Id.* Later, a hung jury resulted in Judge Waterstone declaring a mistrial. *Id.* at 289-90. At the 2006 retrial before a different judge, a prosecuting witness testified that Aceval contacted him and urged him to provide false testimony. *Id.* at 290. Aceval subsequently pleaded guilty to the possession charge. *Id.*
On appeal, the defendant raised various arguments: First, that the trial court deprived him of his right to counsel. *Id.* at 288. Second, that the complicity of Judge Waterstone, the officers and the prosecutors in the perjured testimony implicated his due-process and double-jeopardy rights such that the courts should have barred a retrial. *Id.* The court of appeals disagreed and affirmed. *Id.* at 294. The Supreme Court, over the dissents of Justices Markman and Hathaway, denied leave to appeal, thus affirming the convictions. People v. Aceval, 790 N.W.2d 698, 698-99 (Mich. 2010).

Finally, Justice Hathaway similarly dismissed Aceval's contention that her ex-husband's position as a Wayne County assistant prosecutor raised an objective appearance of impropriety.[106] In doing so, she noted she was divorced from Richard Hathaway for over 15 years and was "unaware of what specific role Richard Hathaway has played in this prosecution, or its relevance to any issue in this case."[107]

Later that year, the full court took up the matter of Justice Hathaway's requested recusal, sustaining her decision on a five-to-zero vote.[108] Justice Corrigan recused herself, explaining that she "may be a witness in a related case [Judge Waterstone's trial]."[109] Justice Young, as he did in *Pellegrino*, declined to participate in the full court's consideration of the recusal motion, explaining that the rule has "serious constitutional flaws."[110]

Justice Markman was the only member of the court to address the issue on the merits. He began by agreeing with Justice Hathaway that Aceval "offered no evidence suggesting that Justice [Hathaway] is biased against defendant or his attorney, or that she cannot decide defendant's case fairly."[111] He then addressed portions of Justice Hathaway's opinion, concluding that her explanation for denying the recusal motion was her lack of "actual bias" toward the litigants, and not her concern with "'objective perceptions' that can be discerned from her circumstances and relationships."[112] That the court had adopted an "'appearance of impropriety' standard,"[113] with Justice Hathaway's assent, followed by her refusal to recuse herself on the grounds of a lack of actual impropriety, Justice Markman wrote, "evidences the confusion that the majority has now introduced into this Court's disqualification process by its new 'appearance of impropriety' standard."[114] Justice Markman further opined: "I continue to be concerned that the vague and formless 'appearance of impropriety' standard is susceptible to arbitrary and inconsistent application."[115] Concluding, Justice Markman explained

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For their role in the affair, Judge Waterstone, now retired from the bench, along with prosecutor Karen Plants, Sergeant Rechtzigel and Officer McArthur face felony charges of misconduct in office. Doug Guthrie, *Court Rejects Appeal Over Drug Trial at Which Judge, Officials Allegedly Lied*, DETROIT NEWS, Dec. 2, 2010.

106. *Aceval*, 781 N.W.2d at 781.

107. *Id.*

108. 782 N.W.2d 204 (Mich. 2010).

109. *Id.* at 206.

110. *Id.*

111. *Id.* at 205 (Markman, J., concurring).

112. *Id.*

113. *Id.*

114. *Aceval*, 782 N.W.2d at 205 (Markman, J., concurring).

115. *Id.*

that he found "no actual bias on the part of Justice [Hathaway], and ... defendant has not satisfied what I view as his threshold obligation to demonstrate even an appearance of impropriety."[116]

D. Acrimony on the High Court

The Michigan Supreme Court has been no stranger to acrimony during the past decade. Much of the heated debate centers around Justice Weaver, a Republican, who was the court's chief justice in the 1999-2000 term.[117] Following the 2000 elections, she asked her colleagues for a second term as chief justice, which they denied her on a six-to-one vote (Justice Weaver herself was the sole dissenter) in favor of Justice Corrigan.[118] At the time, Justice Weaver was one of five Republican justices on the court, including Justices Corrigan, Markman, Young and Taylor.[119] Since 2001, there have been numerous signs of strain between most of the court's Republicans and the court's Democrats, and the latter found an apparent ally in Justice Weaver. In an interview, Justice Young identified the Democratic Party's successful 2008 campaign to unseat then-Chief Justice Clifford Taylor, coupled with Justice Weaver's behavior, as having contributed to friction between the justices.[120] "I don't know how we can conduct the judicial business of this state when one member reserves the authority for herself to disclose what's happening in the decisional conference," he said.[121] Justice Young was referring to a dispute that received national coverage in 2009, in which Justice Weaver objected to the then-majority's adoption of a court rule prohibiting publication of the court's internal deliberations.[122] The rule specified that it covered "correspondence, memoranda and discussions regarding cases or controversies."[123] As the article summarized: '[T]he

116. *Id.*

117. Louie Meizlish, *Weaver Voted Out as Chief Justice of State's Conservative Supreme Court*, MICH. DAILY, Jan. 5, 2001, http://www.pub.umich.edu/daily/2001/jan/01-05-2001/news/05.html.

118. *Id.*

119. *Id.*

120. *Young: No Collegiality on Court*, GONGWER NEWS SERV.—MICH. (Jan. 9, 2009), http://www.gongwer.com/programming/news_articledisplay.cfm?article_ID=480050104&newsedition_id=4800501&locid=1&link=news_articledisplay.cfm?article_ID=480050104%26newsedition_id=4800501%26locid=.

121. *Id.*

122. Adam Liptak, *Unfettered Debate Takes Unflattering Turn in Michigan Supreme Court*, N.Y. TIMES, Jan. 9, 2007, at A21, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C01E7DD1E30F93AA25752C0A9619C8B63&sec=&spon=&pagewanted=all.

123. *Id.*

court's [then-]chief justice has accused Justice Weaver of behaving like 'a child engaging in a tantrum.' In the opinion, Chief Justice Clifford W. Taylor suggested that she continue her protests with a hunger strike, as that 'seemed to have the potential for everyone to be a winner.'"[124] For her part, Justice Weaver had accused the then-majority of "'bully tactics,' 'abuses of power and grossly unprofessional conduct' and trying to censor her."[125]

But the first major sign of trouble on the court did not surface in 2009, but much earlier, in the summer of 2002, when in a series of sharply divided rulings, tensions on the court "boil[ed] over" as it closed out the term.[126] Both sides — the Republican majority and Democratic minority — accused each other of disregarding the principle of *stare decisis* in arriving at their conclusions.[127] Justice Young "sniped" that he "welcome[d] Justice Cavanagh's newly announced repudiation of 'judicial activism in any form.' We question whether his new judicial philosophy includes the obligation to respect and follow the law, even where it is inconvenient to one's policy preferences."[128] For his part, Justice Cavanagh accused his Republican colleagues of "disregard(ing) the foundational principles of our adversarial system of adjudication. As protectors of justice, we refrain from deciding issues without giving each party a full and fair opportunity to be heard."[129] More recently, acrimony was evident after the 2008 election when the court adopted a rule eliminating funding for justices' chambers outside of the court's headquarters at the Hall of Justice in Lansing.[130] While the rule would have arguably imposed some degree of hardship on Justices Young, Kelly and Corrigan, whose Detroit offices would presumably close, forcing a commute to Lansing, the greatest inconvenience would fall on Justice Weaver, a resident of the Traverse City area who maintained

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124. *Id.*

125. *Id.*

126. *Supreme Court Warfare Boils Over in Final Decisions*, GONGWER NEWS SERV.—MICH. (July 31, 2002), http://www.gongwer.com/programming/news_articledisplay.cfm?article_ID=411460101&newsedition_id=4114601&locid=1&link=news_articledisplay.cfm?article_ID=411460101%26newsedition_id=4114601%26locid=1 (last visited Feb. 4, 2010).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Weaver: Justice Offices Important Matter, Young: Court Savings Imperative*, GONGWER NEWS SERV.—MICH. (Nov. 17, 2008), http://www.gongwer.com/programming/news_articledisplay.cfm?article_ID=472230103&newsedition_id=4722301&locid=1&link=news_articledisplay.cfm?article_ID=472230103%26newsedition_id=4722301%26locid=1 (last visited April 4, 2010).

chambers in Glen Arbor.[131] Justice Weaver complained of "how this issue was brought up so suddenly after Chief Justice Taylor was not re-elected to serve another term on the Supreme Court."[132]

As the November 2010 elections approached, Justices Weaver and Young both planned to seek reelection to eight-year terms. In the middle of the summer, Justice Weaver announced she would not seek the Republican nomination to retain her seat, but would seek another term as an independent.[133] Then, shortly before the Democratic state convention in August, Justice Weaver, along with Gov. Jennifer Granholm, jointly announced that the veteran judge from Northern Michigan was resigning immediately and the governor was appointing Michigan Court of Appeals Judge Alton Davis to fill the vacancy on the high court.[134] Justice Weaver had conditioned her resignation on the governor appointing a fellow Northern Michigander to fill the vacancy, and Justice Davis, a Crawford County resident, fit the bill.[135] The Democrats proceeded to nominate Justice Davis for another eight-year term, but, come November, Republicans succeeded in not only reelecting Justice Young but also in unseating the new justice with their own candidate, Judge Mary Beth Kelly of the Wayne County Circuit Court.[136] With Justice Young's reelection and Judge Kelly's election, the Republicans regained the four-to-three majority they held on the court prior to Chief Justice Taylor's defeat in 2008.[137]

In late 2010, the court made public a letter sharply criticizing now-former Justice Weaver for her conduct as a justice when she secretly tape recorded and revealed the court's internal deliberations.[138] The court's

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131. *Id.*

132. *Id.*

133. Barton Deiters, *State Supreme Court Justice Elizabeth Weaver will seek reelection without party affiliation*, GRAND RAPIDS PRESS, July 2, 2010, at A3, *available at* http://www.mlive.com/news/grand-rapids/index.ssf/2010/07/state_supreme_court_justice_el.html.

134. *Granholm names Alton Thomas Davis to Michigan Supreme Court*, ANNARBOR.COM (Aug. 26, 2010), http://www.annarbor.com/elections/granholm-names-alton-thomas-davis-to-michigan-supreme-court.

135. *Id.*

136. *GOP recaptures control of Michigan Supreme Court*, MACOMB DAILY (Nov. 3, 2010), http://www.macombdaily.com/articles/2010/11/03/news/politics/srv0000009853964.txt.

137. *Id.*

138. Dawson Bell, *Former justice Elizabeth Weaver censured for airing deliberations*, DETROIT FREE PRESS (Nov. 22, 2010), http://www.freep.com/article/20101122/NEWS06/101122016/Former-justice-Elizabeth-Weaver-censured-for-airing-deliberations. "The censure stems from Weaver's release in October of partial transcripts of a meeting of the court to discuss a pending case in 2004.

three Republicans, along with Justices Cavanagh and Kelly, signed the letter, while Justices Hathaway and Davis did not.[139] Time will tell whether this letter marks the end of the soap opera involving Justice Weaver.

III. ANALYSIS

The U.S. Supreme Court's directive in *Caperton v. A.T. Massey Coal Co.* was anything but clear. As Justice Kennedy noted for the majority: "The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case."[140] To the extent that the parties "point[ed] to no other instance[,]" the precedential value of *Caperton* is unclear. The decision provided little guidance for state courts to determine, in the context of campaign contributions, when a political supporter's donations result in a "probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable."[141] In dissent, Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, zeroed in on the line-drawing the court's holding would seem to require:

> 1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?
>
> 2. How do we determine whether a given expenditure is "disproportionate"? Disproportionate *to what* ?
>
> 3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?
>
> 4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?[142]

The Michigan Supreme Court has attempted to put the Michigan Court

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She said the transcripts showed that Justice Robert Young Jr. had used inappropriate language and should not be re-elected." *Id.*

139. *Id.*

140. *Caperton*, 129 S. Ct. at 2265.

141. *Id.* (quoting *Withrow*, 421 U.S. at 47).

142. *Id.* at 2269 (Roberts, C.J., joined by Scalia and Thomas, JJ., dissenting).

Rules in line with its federal counterpart's interpretation of the U.S. Constitution, but in doing so, it ducked the difficult question Chief Justice Roberts asked in *Caperton*: How much spending is too much? For the time being, it appears the court will address this question on a case-by-case basis. So far we know this much: An attorney making the maximum donation to a justice's reelection campaign is not, by itself, grounds for recusal in Michigan.[143] And that's all we know so far.

A. Why Did the Court Amend its Rules?

Chief Justice Kelly was effusive in her praise of the *Caperton* decision.[144] She wrote: "[N]othing less than due process is at risk when a litigant can effectively choose the judge who will hear his or her case."[145] Noting that the court had commenced a process of updating its disqualification rules, Chief Justice Kelly added, "*Caperton* signals that we do need to have appropriate protections in place."[146] But just what protections are necessary and which ones are feasible? As Chief Justice Roberts noted in his dissent, "a 'probability of bias' cannot be defined in any limited way. The Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required."[147] But *Caperton*'s ambiguity is a two-sided coin. While it provides little "guidance" to state courts, the flip side is that *Caperton* allows states to experiment with recusal rules that both protect litigants' due process rights yet prevent frivolous "Caperton claim[s]."[148] The Michigan Supreme Court should not have shirked from this opportunity.

First, consider some of the arguments against substantial change to the recusal rules. Some argue that the amended rule is a solution in search of a problem, as significant protections are already in place. For example, a judge on the Michigan Court of Appeals, Christopher Murray, emphasized a judge's oath to uphold the state and federal constitutions and provisions of the Michigan Judicial Code of Conduct as

143. *Dumas*, 789 N.W.2d at 445.

144. Press Release, Michigan Supreme Court Office of Public Information, *Caperton Ruling by U.S. Supreme Court Highlights Importance of Fair and Impartial Justice, Says Michigan Supreme Court Chief Justice Marilyn Kelly*, at *2 (June 9, 2009), *available at* http://courts.michigan.gov/supremecourt/Press/060909-CapertonDQ.pdf (last visited Apr. 11, 2010).

145. *Id.*

146. *Id.*

147. *Caperton*, 129 S.Ct. at 2267 (Roberts, C.J., joined by Scalia, Thomas, Alito, JJ., dissenting).

148. *Id.* at 2274 (Scalia, J., dissenting).

supporting the "strong presumption" that a judge is impartial.[149] Citing statistics Lansing attorney Richard McLellan provided,[150] Judge Murray said "the present issue in Michigan has in large part been manufactured by a small number of attorneys and politicos who have tried to turn our system of electing justices into a basis for arguing that certain justices are not 'impartial.'"[151]

The argument, essentially, that "there is no problem," is overcome. A 2002 study of Michigan Supreme Court elections by the National Institute on Money in State Politics found that "[i]n cases heard before the Michigan Supreme Court between 1990 and 1999, eighty-nine percent involved a party, lawyer, business or other organization that made a contribution to a justice during the eight-year period[.]"[152] Even accounting for the fact that half of those contributors were employed by the state of Michigan,[153] this figure is quite substantial. Furthermore, thirty-five percent of the attorneys who argue before the Michigan Supreme Court have made a contribution to a judicial candidate.[154]

Public attitudes toward the court also suggest the benefit of stronger recusal rules. In a poll conducted by the Michigan Campaign Finance Network, "67 percent of Michigan voters doubt a judge's ability to be fair and impartial in a case where one of the parties spent $50,000 to support the judge's election."[155] Also, eighty-five percent of poll

149. *Prepared testimony of Honorable Christopher M. Murray on Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, Michigan Supreme Court, at *2 (Aug. 5, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-Murray.pdf.

150. *Prepared testimony of Richard D. McLellan, Comm. Hearing on HJR P — Disqualification of Justices,* MICH. H.R. at *6 (June 24, 2009), *available at* http://www.house.mi.gov/SessionDocs/2009-2010/Testimony/Committee14-6-24-2009.pdf. McLellan described the results of his research of recusal motions before the Michigan Supreme Court. *Id.* McLellan said the average number of recusal motions was two per year over the thirty years preceding 2007. *Id.* Between 2003 and 2007, there were thirteen motions, of which eleven were filed by prominent trial attorney Geoffrey Fieger or his law firm. *Id.*

151. Murray, *supra* note 149, at *3 n.3.

152. Samantha Sanchez, Nat'l Inst. on Money in State Politics, Campaign Contributions and the Michigan Supreme Court, at *2, *available at* http://www.followthemoney.org/press/MI/20020301.pdf (last visited April 4, 2010).

153. *Id.*

154. *Id.*

155. *Prepared testimony of Richard L. Robinson, Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, Michigan Supreme Court at *3 (July 31, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-MCFN.pdf.

participants said judges receiving $50,000 from a party should not hear a case involving that party.[156] A transparent process where the court carefully — and publicly — considers legitimate questions about a judge's potential for bias, can only serve to enhance public perceptions about the court's integrity.

Furthermore, Chief Justice Clifford Taylor's defeat by Democrat Diane Hathaway in the 2008 election (the first election in 24 years in which an incumbent justice did not retain his seat),[157] along with Justice Davis' defeat two years later, is, at the very least, circumstantial evidence of dissatisfaction among the public toward the court. The ballot designates all Michigan judges running for reelection (or retention) as incumbents of the position they seek, and this "incumbency designation . . . has nearly always been a benefit in past elections."[158] That such designation was not so useful to Justices Taylor and Davis in 2008 and 2010, respectively, indicates that times have changed and the court has work to do in restoring public confidence.

The campaign practices of interest groups and litigants is also troubling. In the 2008 election, six trade- and business-association political action committees ("PACs") contributed more than $25,000 to Justice Taylor's reelection, comprising over 15 percent of the donations to his campaign committee.[159] Furthermore, one of those entities, the Michigan Chamber of Commerce, spent an additional $1.671 million on television advertising on Chief Justice Taylor's behalf, which comprised 45.4 percent of all the pro-Taylor advertising (besting Taylor's own campaign committee and that of the Michigan Republican Party).[160]

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156. *Id.*

157. CITIZEN'S GUIDE TO MICHIGAN CAMPAIGN FINANCE, MICH. CAMPAIGN FIN. NETWORK 14 (Apr. 2009), *available at* http://www.mcfn.org/pdfs/reports/MCFNCitGuide08.pdf (last visited April 4, 2010).

158. *Historic Loss for Taylor, Breaking Conservative Court Majority*, GONGWER NEWS SERV.—MICH. (Nov. 4, 2008), http://www.gongwer.com/programming/news.cfm?date=11-4-2008.

159. CITIZEN'S GUIDE, *supra* note 157, at 14, 31.

160. *Id.* MCFN's data included both advertising by political committees (such as PACs and candidate committees) and "issue advertising" by non-political committees. *Id.* Issue advertising, unlike express campaign communications, does not involve the *explicit* advocacy of a candidate's election or defeat. MCFN was able to obtain its data on television issue advertising spending from the public files of Michigan broadcasters. *Id.* Data on Internet and postal-mail advertising by these organizations was not available. *Id.* Additionally, issue advertising is usually purchased not by the organization's political committee, but by the organization itself. For example, the Michigan XYZ Association might spend $200,000 on advertising to the effect of "Officeholder A is doing a marvelous job. Call Officeholder A and thank him for his good work." Simultaneously, the Michigan XYZ Association's PAC will purchase advertisements that say

Similarly, five trade-union PACs contributed the quite substantial funds of $20,000 or more to Justice Hathaway, composing more than 19 percent of Hathaway's funding.[161]

While these amounts may not rise to the "extreme"[162] level of campaigning at issue in *Caperton*, they are certainly not trivial amounts. For example, the Michigan Chamber of Commerce's issue advertising alone—excluding direct contributions—was $1.67 million;[163] nearly as much as the $1.94 million Chief Justice Taylor's own campaign raised.[164]

Donating substantial sums to a judicial candidate's campaign — or expending substantial amounts in furtherance of their campaign — is not a manifestation of altruism. It would be folly to conclude that the Michigan Chamber's contributions to Republican candidates, like the unions who contribute to Democratic candidates, do not expect a return on their investment.

For example, consider the circumstances of Justice Hathaway's investiture ceremony in January 2009, whose emcee was none other than the president of the Michigan State AFL-CIO, Mark Gaffney.[165] As journalist Susan Demas wrote, a campaign supporter's presence leading a judicial investiture ceremony is improper.[166] In fact, if the investiture ceremony served a beneficial purpose, it was this: the judge revealed her biases.[167] As Demas opined: "[F]or all the half-hearted claims at her swearing-in about fairness and ridding the court of an agenda, the fact that she only thanked a slew of Democrats and interest groups, from Michigan Democratic Party Chair Mark Brewer to Clean Water Action, told a very different story."[168]

This is not to accuse Justices Hathaway or Taylor of being corrupt or conducting themselves in bad faith. But we expect too much of judges to

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"Officeholder A is doing a marvelous job. On Election Day, vote to reelect Officeholder A."

161. *Id.*

162. *Caperton*, 129 S. Ct. at 2265.

163. CITIZENS GUIDE, *supra* note 157, at 14.

164. *Id.* at 56 (Appendix D: Michigan Supreme Court Television Advertising by Market, 2008).

165. Susan Demas, *Supreme Court Partisan Extravaganza with Diane Hathaway and the Democrats!*, MLIVE.COM (Jan. 10, 2009), http://blog.mlive.com/capitolchronicles/2009/01/supreme_court_partisan_extrava.html.

166. *Id.* ("M.C. Mark Gaffney, Michigan AFL-CIO president, set the tone when he declared the governor and lieutenant governor have to keep a watchful eye on the judiciary, but laughed that they could be a 'little less wary' when a justice belongs to the same political party." *Id.*).

167. *Id.*

168. *Id.*

not be grateful to those who support them — to "like," for lack of a better term, those who were good to them. Chief Justice Roberts and Judge Murray may well point to the "presumption of honesty and integrity in those serving as adjudicators" and the fact that "all judges take an oath to uphold the Constitution and apply the law impartially, and ... trust that they will live up to this promise."[169] But this view confuses good faith with impartiality. In a hypothetical lawsuit between the Michigan State AFL-CIO and the Michigan Chamber of Commerce, could one really expect Justice Hathaway or Justice Taylor to be impartial? We ask too much of judges to expect them to be impartial when their futures on the court depend in some measure on the will of the litigants before them.

Merely taking the oath of office did not dissuade Vice President Spiro Agnew from taking bribes,[170] nor did the oath, more recently, prevent a Louisiana justice of the peace from denying marriage licenses to interracial couples.[171] If an oath itself cannot stop officials from acting unlawfully or in flagrant derogation of the Constitution, how can one reasonably argue that an oath is enough to ensure that judges, in all cases, will recuse themselves when recusal is appropriate?

In the Federalist Papers, Alexander Hamilton wrote, "a power over a man's subsistence amounts to a power over his will."[172] In arguing for lifetime tenure of federal judges, Hamilton stressed that if judges are made subservient to the legislative branch, their rulings will reflect an interest in remaining in the legislature's good graces.[173] Hamilton continued, "the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights

169. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., joined by Scalia, Thomas and Alito, JJ., dissenting) (internal citation omitted).

170. Francis X. Clines, *Spiro T. Agnew, Point Man for Nixon Who Resigned Vice Presidency, Dies at 77*, N.Y. TIMES, Sept. 19, 1996, at 15, *available at* http://www.nytimes.com/1996/09/19/us/spiro-t-agnew-point-man-for-nixon-who-resigned-vice-presidency-dies-at-77.html.

171. *Interracial Couple Denied Marriage License By Louisiana Justice Of The Peace*, ASSOC. PRESS (Oct. 15, 2009), http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html.

172. THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

173. THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed. 1961). He continued:

> Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it *operates as a check upon the legislative body in passing them*[.]

Id. (emphasis added).

of particular classes of citizens, by unjust and partial laws."[174] Hamilton's statements also supports the proposition that elected judges should be insulated from the pressure of deciding cases of the litigants — not just the legislators — who put them in power.

The argument for strengthened disqualification rules was best made by a former Detroit judge, Rudy Serra: "A saint would be hard-pressed to disregard the fact that one litigant gave them a huge donation while the other gave nothing. Most of our judges are not saints."[175]

Caperton is no doubt an exceptional case. It is clear from the case that Blankenship, the head of Massey Coal, delivered the election to Justice Benjamin with his $3.5 million in expenditures. Sheldon Miller, on the other hand, didn't deliver Justice Kelly's election with his $3,400 contribution. But are the cases really so different? Justice Kelly's conclusion that "given the obvious difference in size between the contribution[s] at issue . . . , one could not reasonably analogize the two cases"[176] is unpersuasive. Of course the contributions are different in size. But Sheldon Miller's donation is no small amount. Given public attitudes toward the court, is it not the case, then, that a reasonable person would question the impartiality of a judge who received the maximum donation from an attorney or litigant?

B. What is an Appropriate Recusal Rule?

The court's old rule — and the Michigan Supreme Court's practice — were inconsistent with the holding in *Caperton*. As the *Caperton* Court explained, "objective standards may . . . require recusal whether or not actual bias exists or can be proved."[177] It continued:

> 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.' ... *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.*[178]

174. *Id.*
175. Serra, *supra* note 1, at *1.
176. *Dumas*, 789 N.W.2d at 445.
177. *Caperton*, 129 S. Ct. at 2265.
178. *Id.* (quoting *Murchison*, 349 U.S. at 136) (emphasis added).

The Michigan Supreme Court's procedures were inconsistent with the *Caperton* standard.[179] Prior to promulgation of the new rule, it was not even clear whether the supreme court considered itself bound by the old Rule 2.003.[180] The rule did not incorporate an objective standard, which would require recusal whenever a judge's "impartiality might objectively and reasonably be questioned."[181] Instead, it vaguely asserted that a "judge is disqualified when the judge cannot impartially hear a case."[182]

As Justice Weaver explained, "the language . . . that a judge should be disqualified whenever *it appears* that he cannot impartially hear a case, is an improvement over the [then-] current provision in MCR 2.003(B) that a judge is disqualified whenever he cannot impartially hear a case."[183]

Justice Corrigan, critiquing Justice Weaver's argument—and, in effect, the holding in *Caperton* itself—suggested that the Michigan Supreme Court's recusal procedures could not be flawed when they almost exactly mirror those of the U.S. Supreme Court.[184] One attorney who echoed this argument pointed out that Chief Justice John Marshall did not recuse himself (and in fact wrote the court's opinion) in *Marbury v. Madison*,[185] even though the case concerned Justice Marshall's actions as President Jefferson's secretary of state.[186] Thus, Timothy Baughman argued, "'it would be *presumptuous* for us to hold that some of the most distinguished jurists' were oblivious to their duty as jurists in these

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179. *Id.* at 2265 ("The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.")

180. *Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, ADM File No. 2009-04, at *12 n.2 (March 18, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-DQ-Order.pdf (Weaver, J., concurring).

181. *Id.*

182. MICH. CT. R. 2.003(B) (1995) (amended 2009).

183. Michigan Supreme Court, *supra* note 180, at *12 n.2 (emphasis added).

184. *Id.* at *24 (Corrigan, J., concurring) (last visited April 4, 2010).

185. 5 U.S. 137 (1803).

186. *Prepared Testimony of Timothy Baughman, Proposals Regarding Procedure for Disqualification of Supreme Court Justices*, MICHIGAN SUPREME COURT at *2 (June 10, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-Baughman.pdf.

Baughman is an assistant prosecutor for Wayne County. He noted that his testimony reflected the views of former Justice Patricia Boyle (1983-98). *Id.* at *10. Another example Baughman cited was Justice Black's denial of a recusal motion in *United States v. Darby*, 312 U.S. 100 (1941), where the court upheld a major piece of labor legislation whose passage Justice Black had secured as a U.S. senator. *Id.* at *2.

circumstances."[187] However, it does not follow from the fact that Chief Justice Marshall sat on the court in the early days after ratification of the Constitution (in horse-and-buggy days, no less) that every act of his was constitutional or even proper, or that his reading of the Constitution was the correct one. At the very least, one can seriously doubt that it would be proper in modern times for a justice to deny a recusal motion in a case involving his actions when he held other public office. Justice Elena Kagan, for example, having recently stepped down as solicitor general to join the U.S. Supreme Court, frequently recuses herself from cases involving her former office.[188]

Several years ago, litigants asked Justice Antonin Scalia of the U.S. Supreme Court to recuse himself from a lawsuit involving then-Vice President Richard Cheney because the justice and vice president were friends and had recently traveled together on a hunting trip.[189] In denying the motion, Justice Scalia wrote:

> While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.[190]

Maintaining confidence in the judiciary is important, but blind faith in a judge's impartiality will not maintain that confidence. Justice Scalia—along with many of the opponents of Michigan's amended recusal rule—seem to misunderstand or mischaracterize bias or partiality. Bias is not limited to situations where a judge is consciously ruling in a party's favor because that party has supported him (or consciously ruling against the party because it opposed him). Bias is more subtle.

When a judge—or any person—runs for public office he must raise money and build coalitions involving a number of people and organizations. As is to be expected, the candidates form bonds, both professional and personal, with their supporters. As these associations, or

187. *Id.* (quoting Del Vecchio v. Ill. Dep't of Corrs., 31 F.3d 1363, 1377 (7th Cir. 1994)) (emphasis added).

188. *See, e.g.*, Bruesewitz v. Wyeth, Inc., 131 S. Ct. 52 (2010); Montana v. Wyoming, 131 S. Ct. 551 (2010); Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 551 (2010).

189. Cheney v. U.S. Dist. Court, 541 U.S. 913 (2004).

190. *Id.* at 928.

bonds, grow over time, do the individuals not become more trusting and less skeptical (in general) of their supporters' assertions? And is that not problematic in the sense that a candidate generally *does not* develop those kinds of relationships with the individuals and organizations supporting his opponent?[191]

Thus, a judge unconsciously will accord the arguments of certain parties—e.g., his contributors—more weight than those of their non-supporters and non-contributors. It is impossible to measure precisely how much (rarely does one reveal his biases by expressing them in direct terms), but that is precisely the point. Individuals not only cannot read one another's minds, they also have trouble reading their own. Thus a judge does not know how much of her decision results from the merits of the arguments, and how much results from the trust or faith she places *in the person making the argument.* For the aforesaid reasons, an objective test for impartiality is much more desirable than a requirement of showing "actual" bias.

Were the justices to dismiss reasonable questions as to their impartiality, litigants' only recourse would be to *attack* the courts themselves in public, thus reducing the court's esteem and reducing its very legitimacy. On the other hand, the court's demonstrating its recognition of basic human nature will only serve to restore public attitudes toward the court and perceptions as to the integrity of the justices.

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191. *See* John Dickerson, *Lobbying and Laziness*, SLATE (Jan. 5, 2006), http://www.slate.com/id/2133829:

> [T]he dance of influence is subtler than people think. If it works right, a member [of Congress] never has to say, even to himself, 'I have to vote for this subsidy because lobbyist Jack has just put a check in my pocket.' That happens on occasion, but usually only when a piece of legislation comes up suddenly, or if a lobbyist goes off script. The more effective scenario, for everyone concerned, involves the lobbyist becoming friendly with members of the Congress member's staff, who research issues and advise him or her what to do and how to vote.
>
> When the member of Congress goes to staff for information, he wants it fast. A staffer can read all available material on the issue, think through the policy, and balance what's right against the member's political interests—or he can call his friend Smitty the lobbyist. Smitty knows all about this complicated stuff in the telecommunications bill. He was talking about it just the other day at the Wizards game, which was almost as fun as the Cointreau-and-capon party Smitty hosted at his spread in Great Falls over Labor Day.

C. Is the New Rule Constitutional?

The three-person Republican minority of Justices Young, Corrigan and Markman contended that the new rule violates both the Michigan and federal constitutions. Does it? Most likely, it does not.

First, recall Justice Corrigan's contentions that the only provisions authorizing removal of justices exist in Articles II and VI of the Michigan Constitution.[192] Her premise is that disqualifying a judge is the *actual equivalent* of removing the judge from office. But is it? After all, removal from office is permanent; disqualification is temporary. A judge disqualified from *an individual case* is not deprived of the fruits of his office. By conflating disqualification with removal, the judges have made an argument that disqualification violates the state constitution. They are wrong.

The dissenters further contend that the new rule, by authorizing appeal of a justice's denial of a motion to recuse himself, is an affront to the democratic system of governance, in effect *un*electing an elected judge.[193] But, importantly, the dissenters had no quarrel with the preexisting provisions of Rule 2.003 authorizing appeals of lower-court judges' decisions denying recusal to other judges.[194] In other words, the dissenters appear to be arguing that forced disqualification of an elected trial or court of appeals judge passes constitutional muster, whereas forced disqualification of a justice is somehow "an infringement on the rights of electors who placed the [judge] in office."[195] How is it that kicking an elected trial or intermediate appellate judge off a case is perfectly consistent with democratic values while disqualifying an elected Supreme Court justice is undemocratic?

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192. Amendment of Rule 2.003 of the Michigan Court Rules, ADM File No. 2009-04, at *14 (Nov. 25, 2009), *available at* http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-112509.pdf (Corrigan, J., dissenting).

193. *Id.* at *21 (Young, J., dissenting). Justice Young explained:

> The removal of a sitting justice against his or her will is a serious matter trenching upon the right to execute the duties of the office to which the justice was elected, as well as an infringement on the rights of electors who placed the justice in office. A justice subject to a motion for disqualification is entitled to the basic due process rights of notice and opportunity to be heard. Heretofore, only an appeal to the United States Supreme Court could reverse a Michigan justice's determination regarding a motion to disqualify.

Id.

194. *See* MICH. CT. R. 2.003(C).

195. Michigan Supreme Court, supra note 192, at *21 (Young, J., dissenting).

Finally, we turn to the dissenters' arguments that the newly amended Rule 2.003 imperils the First Amendment. "[T]he mere *threat* of future disqualification produces a chilling effect on protected speech," Justice Young asserted.[196] His argument is quite a stretch. The rule does not actually preclude a justice (or judicial candidate) from speaking her mind on any issue. A candidate who speaks his mind on any issue, or even one who addresses the merits of *any case pending before the court*, is not denied the opportunity to hold office. The only consequence is that when a judge's statements on a case lead a reasonable person to conclude she might be biased, there is a strong possibility the judge will not sit on the case. It strains credulity to argue that the threat of being disqualified from *one case* will have the "chilling effect"[197] with which Justice Young concerns himself.

IV. CONCLUSION

In amending Rule 2.003,[198] the Michigan Supreme Court succeeded in adopting the "objective" standard of "probability of actual bias" *Caperton* requires.[199] Unfortunately, the rule concerns itself with campaign contributors—the impetus behind *Caperton*–only in the abstract. The new rule provides that a judge must recuse himself when "based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party . . . or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."[200] Unsurprisingly, the Code of Judicial Conduct does not mention campaign spending at all. The logical question, then, is has the court really accomplished anything in amending Rule 2.003?

At the very least, the Michigan Supreme Court has now conformed—at least in form, if not in substance—its rules to the U.S. Supreme Court's holding in *Caperton*. It has provided a means for the court to hear removal motions that implicate *Caperton* without litigants having to suffer an adverse judgment, and then appeal to the U.S. Supreme Court, which, of course grants certiorari in precious few cases. To that extent, it puts the litigants campaign contributions to judges under the microscope of the Michigan state courts.

196. *Id.* at *24.
197. *Id.*
198. MICH. CT. R. 2.003.
199. *Caperton*, 129 S. Ct. at 2257.
200. MICH. CT. R. 2.003(C)(1)(b).

Nevertheless, the newly amended Rule 2.003 also leaves quite a bit to be desired: it does not address or define amounts of campaign spending—or, generally, the extent of campaign activity by litigants—that should trigger disqualification. The court has essentially punted these decisions to subsequent cases. Presumably, the jurisprudence on Rule 2.003 disputes relating to campaign activity will develop on a case-by-case basis.

Helping to confuse the issue of recusal at the Michigan Supreme Court is a high level of distrust between the Democratic and Republican justices, with an estranged Republican Justice Elizabeth Weaver increasingly siding with the Democrats. Given the acrimonious statements over the years between the Democrats and Republicans—and between the Republicans and Justice Weaver—a reasonable conclusion is that the controversy surrounding the amendment of Rule 2.003 may have as much to do with personalities as it does with disputes over constitutional interpretation. As John Lindstrom, a long-time journalist covering the court, wrote recently:

> [A]ll through the 1990s anyone reading Supreme Court decisions could not help but be astonished at the growing acrimony that was clear, often in the footnotes, often coming close to the justices calling each other nitwits.
>
> But the decade long dispute within the court is nearly unprecedented, and it has a clear genesis: the court's decision to deny Ms. Weaver a second term as chief justice. She had been elected the chief justice in 1999, but ongoing administrative problems led to her colleagues all deciding to reject her bid for a second full term, which has been typical.
>
> It hurt her, one can't but help to think, in a way few things have done in her life.[201]

It is unclear how much the support for—and opposition to—the amended rule is driven by policy and/or legal concerns, and how much is driven by personal animosity. It appears that the Republican justices, who for a long time comprised the majority, saw the new rule as a judgment on their conduct on the court while in the majority, and did not appear to trust the then-emboldened Democratic majority to implement an "objective standard." The thirteen-month period between late

201. John W. Lindstrom, *The Personal Price of Justice, 2010 Ann. Survey of Mich. Law*, 56 WAYNE L. REV. 873 (2010).

November 2009 and January 1, 2011, saw only a few Supreme Court cases involving disputes over the revised Rule 2.003, none of them involving the justices disqualifying one of their colleagues against his or her will.

What to make of this? The Republican justices' predictions of chaos did not come to fruition, at least not yet. On the other hand, there has been no case even remotely approximating the circumstances of *Caperton* that validates the need for the rule amendments. But Michiganders should ask themselves whether elected judges, dependent on contributions for their elections and reelections, can ever be impartial when litigants or attorneys appearing before them have donated large sums to the judges' campaigns.[202]

As the Supreme Court has reverted to Republican control with the election of Justice Mary Beth Kelly, we will soon find out whether the court continues to debate and experiment with its post-*Caperton* amendments to Rule 2.003, or discard it altogether, as Justices Young and Corrigan would clearly prefer. Time will tell.

LOUIS F. MEIZLISH

202. Readers interested in the debate over the method of choosing state court judges should peruse Volume 56, Issue 2, of *The Wayne Law Review*, which devotes itself almost exclusively to the debate surrounding the means of choosing state judges. This issue is available online at http://www.waynelawreview.com/archives.php. *See, e.g.*, John B. Wefing, *Two Cheers for the Appointment System*, 56 WAYNE L. REV. 583 (2010); Matthew Schneider, Why Merit Selection of State Court Judges Lacks Merit, 56 WAYNE L. REV. 609 (2010).