



April 11, 2022

Via Email

Edythe Nash Gaiser, Clerk of Court
WV Supreme Court of Appeals
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston, WV 25305

Re: Procedural Rules for the WV Intermediate Court of Appeals

Dear Ms. Nash Gaiser,

I write on behalf of partners in the WV Citizens for Clean Elections (WVCCE) coalition to comment on the amendments to the Rules of Appellate procedure, and more specifically Rule 33 pertaining to “Disqualification of a Judge of the Intermediate Court or of a Justice of the Supreme Court.” WVCCE advocates for protecting judicial independence, guarding against special interest influence and political pressure, and ensuring fairness and impartiality in our courts.

We appreciate the work that has gone into updating the rules and we commend the Supreme Court for its commitment to transparency in the establishment of the Intermediate Court of Appeals, and to ensuring that West Virginians have trust and confidence in the process. However, we write to highlight two concerns with amended Rule 33 that we urge you to address.

First, the rule as drafted does not have procedures to ensure recusal decisions receive meaningful review by independent decision-makers when a Judge or Justice who is subject of a disqualification motion refuses to step aside from a case. The West Virginia Code of Judicial Conduct acknowledges that there are instances when a judge’s participation in a case would be inappropriate. Rule 2.4. of the West Virginia Code of Judicial Conduct, entitled “External Influences on Judicial Conduct” provides in section (B): “A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.” In addition, Rule 2.3. regarding “Bias, Prejudice, and Harassment” states in section (A) that “A judge shall perform the duties of judicial office, including administrative duties,

without bias or prejudice.” Importantly, the Code further provides in Rule 1.2. pertaining to “Confidence in the Judiciary,” that “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

Notably, the U.S. Supreme Court has ruled that the Due Process Clause of the Fourteenth Amendment requires a judge to step aside when the circumstances of a case present a “serious risk of actual bias.” Indeed, disqualification is crucial to safeguarding the reality and perception of judicial integrity, and ensuring confidence in the judiciary. Yet, there are inherent risks to allowing judges to determine their own impartiality, as Rule 33 permits. As Justice Anthony Kennedy observed in *Williams v. Pennsylvania*, one of the high court’s major opinions on recusal, “[b]ias is easy to attribute to others and difficult to discern in oneself.” As such, it is critical that the final determination of whether a Judge or Justice is impartial not be left to the Judge or Justice who is the subject of a disqualification motion.

A sensible mechanism is needed for independent review by someone other than the challenged judge. West Virginia already provides for independent review of recusal motions at the trial court level, and we urge you to adopt procedures for both the Intermediate Court and the Supreme Court that will leave the final decision to objective, disinterested parties. At a time when the code of conduct for the U.S. Supreme Court is under increased scrutiny for lacking such procedures and leaving it the Justices themselves to decide whether to recuse, the West Virginia Supreme Court has an opportunity to adopt strong anti-bias rules that will increase public confidence in the new appellate court, as well as in the state Supreme Court itself.

Our other concern with Rule 33 as currently drafted is that the proposed rule does not take into account the modern realities of judicial elections, the continued rise of independent expenditures in these election, and the perception, if not the reality, that decisions in the courtroom are influenced by partisan political concerns and campaign spending.

More than a decade has passed since the U.S. Supreme Court issued its landmark decision in *Caperton v. Massey*, which highlighted the importance of recusal as a tool to protect judicial fairness and impartiality in this environment. However, West Virginia has yet to adopt reforms in response to the threats identified in *Caperton*, even though the concerns about campaign spending in judicial elections are more relevant than ever. In fact, an analysis by the Brennan Center of Justice released in January found that in 2019–2020, state supreme court elections attracted more money — including more spending by special interests — than any judicial election cycle in history.

The spending documented in the Brennan Center report poses a threat to the appearance and reality of justice in West Virginia and around the country. Therefore, it is important for public

confidence to recognize that impartiality may reasonably be questioned, and disqualification necessary, because of campaign spending by litigants and attorneys.

Strengthening the recusal rules that apply to the Intermediate Court, as well as the Supreme Court itself, will help avoid real and perceived conflicts of interest while promoting judicial independence and accountability when wealthy individuals and outside groups choose to weigh in on judicial elections. We strongly encourage you to incorporate criteria into amended rule that takes into account the fact the certain campaign contributions and expenditures made in judicial elections raise concerns about judicial fairness and impartiality.

In closing, we are grateful for the opportunity to submit these comments on the procedural rules that are necessary to set forth appellate procedures for the Intermediate Court of Appeals. As you work to finalize these amended rules, we urge you to address our concerns and to incorporate our recommendations for strengthening Rule 33. Reasonable models exist for providing independent review of recusal decisions and addressing the problems posed by campaign contributions and independent expenditures in judicial elections. The Brennan Center for Justice has a number of thoroughly researched papers on threats to judicial independence and best practices for recusal. We encourage you to consult them and their resources in furtherance of our common goals of ensuring fair and impartial courts and promoting public confidence in West Virginia's judiciary.

Thank you for your consideration.

Sincerely,

Julie Archer
Project Manager, WV Citizen Action Group
Coordinator, WV Citizens for Clean Elections