JOHN MAYER

1061 18th Street
Wyandotte MI 48192

734-558-5593
jmayer@wyan.org

July 10, 2010

Anne M. Smith
State Bar of Michigan
306 Townsend St.
Lansing, MI 48933

Re: Proposed Resolution Requiring Disclosure Prior to an Election of the Sources of Funding for All Expenditures for Electioneering Communications

Dear Ms. Smith:

In order to implement recent United States Supreme Court decisions in *Caperton v. Massey Coal Co.* and *Citizens United v. Federal Elections Commission*, the Michigan Campaign Finance Act and related statutes should be amended to require disclosure prior to a judicial election of the sources of funding for all expenditures for electioneering communications

The Michigan Supreme Court has recently amended MCR 2.003 providing that a judge should recuse himself or herself where the judge, based on objective and reasonable perceptions, has either a serious risk of actual bias impacting the due process rights of a party or has failed to adhere to the appearance of impropriety standard set forth in Rule 2 of the Michigan Code of Judicial Conduct.

The Michigan Campaign Finance Act has a huge hole in it because it does not require disclosure of the source of funding of third-party issue advertisements. Only advertisements by candidate committees or political parties are identified in any way that is comprehensible to voters in a timely way, i.e. so that the bias of the advertiser can be evaluated prior to the voter casting a vote. Information which might compel recusal of a judge sitting on a case involving a substantial campaign supporter is not only not available in a timely way before the election, it may never be revealed.

Please forward copies of this letter and the attached proposal to RA Chair Elizabeth Johnson and the Rules and Calendar Committee so that it may be placed on the agenda for the meeting on September 30th. A hard copy of this letter and proposal are also being placed in the U. S. mail today. Thank you for your assistance in this important matter.

Sincerely,

John P. Mayer, Member, 3rd Circuit

PROPOSED RESOLUTION REQUIRING DISCLOSURE PRIOR TO AN ELECTION OF THE SOURCES OF FUNDING FOR ALL EXPENDITURES FOR ELECTIONEERING COMMUNICATIONS

Issue

Should the State Bar of Michigan adopt the following resolution calling for an amendment to the Michigan Campaign Finance Act requiring disclosure prior to a judicial election of the sources of funding for all expenditures for electioneering communications?

RESOLVED, that in order to implement recent United States Supreme Court decisions in *Caperton v. Massey Coal Co.* and *Citizens United v. Federal Elections Commission*, the Michigan Campaign Finance Act and related statutes should be amended to require disclosure prior to a judicial election of the sources of funding for all expenditures for electioneering communications.

Synopsis

Disclosure prior to a judicial election of the sources of funding for all expenditures for electioneering communications serves two essential purposes: (1) Before the judicial election, it allows voters to evaluate the sources of funding for all electioneering communications in deciding how to vote on judicial candidates; and (2) for as long as a judge may serve, it allows litigants and attorneys to determine whether a request or motion for recusal of an elected judge is well-founded.

Background

In the case of *Caperton v. Massey Coal Company,* the Supreme Court held that it is unconstitutional for an elected judge to participate in a case involving an extraordinary financial supporter of the judge's election campaign. The Court ruled that the probability of bias violated the due process right of the campaign supporter's legal opponent to an impartial judicial hearing.

Importantly, the extraordinary spending in *Caperton* involved independent expenditures, not a contribution directly to the judge's campaign committee. Therefore, the constitutional requirement for an elected judge to disqualify himself in a case involving an extraordinary campaign financial supporter is relevant to campaign spending in its many forms, not just contributions directly to the judge's campaign committee.

In writing for the 5-4 majority, Justice Anthony Kennedy observed, "Because the States may have codes of conduct with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standard's application rare."

The Michigan Supreme Court has recently amended MCR 2.003 providing that a judge should recuse himself or herself where the judge, based on objective and reasonable perceptions, has either a serious risk of actual bias impacting the due process rights of a party or has failed to adhere

to the appearance of impropriety standard set forth in Rule 2 of the Michigan Code of Judicial Conduct.

However, the Michigan Campaign Finance Act has a huge hole in it because it does not require disclosure of the source of funding of third-party issue advertisements. Only advertisements by candidate committees or political parties are identified in any way that is comprehensible to voters in a timely way, i.e. so that the bias of the advertiser can be evaluated prior to the voter casting a vote. Information which might compel recusal of a judge sitting on a case involving a substantial campaign contributor is not only not available in a timely way before the election, it may never be revealed.

In *Caperton,* the Court ruled that an expenditure of $3 million in support of a state supreme court judicial candidate--who after being elected declined to recuse himself and cast the deciding vote in reversing a $50 million judgment against the contributor--was a denial of Due Process under the 5th and 14th Amendments. The Court quoted language from a prior decision requiring recusal where "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." The Court went on to say that the risk that the contribution engendered actual bias was so substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

The *Caperton* case has given rise to nationwide discussion and debate along these lines: If $3 million is obviously too much, how much less than $3 million is too much. If our goal is to restore public confidence in the judiciary, the arbiter here must be public opinion however it can be determined. The ABA model rule on this point leaves the bright-line decision to each state.

The Michigan Campaign Finance Network recently commissioned a survey indicating that 85% of Michigan voters believe that a judge should recuse himself or herself from a case in which a party to the case has spent $50,000 to support the judge's election campaign. The same survey revealed that 96% of Michigan voters believe it is important that all sources of spending in judicial election campaigns be disclosed. For news release giving more details on survey, click on http://www.mcfn.org/press.php?prId=80

In Part IV of the opinion in *Citizens United,* the Court held that government has an interest in providing the electorate with information about the sources of spending for election-related communications, so citizens can make informed decisions in the political marketplace. Plaintiff Citizens United claimed that disclosure requirements should apply only to the functional equivalent of express advocacy.

The Court emphatically disagreed. Justice Kennedy, writing for himself and seven other justices, said: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Summation

The *Citizens United* case, by invalidating state laws prohibiting substantial contributions by corporations and labor unions, is likely to greatly increase the flow of "big money" into judicial campaigns. Michigan voters, and especially Michigan litigants, are entitled to know which individuals, companies or unions are contributing to which electioneering communications and how much they are contributing. The Supreme Court in *Citizens United*, by a vote of 5-4, said that any attempt to regulate content of electioneering communications is a violation of First Amendment Freedom of Speech. But, by a vote of 8-1 the Court upheld the right of government to require full disclosure of the sources of funding for electioneering communications. In order for disclosure to be effective, it must be made sufficiently before an election to be publicized and scrutinized by all interested parties, especially voters and litigants.

Opposition to the Proposal

None known.

Fiscal Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on September 30, 2010

Should the State Bar of Michigan adopt the following resolution calling for an amendment to the Michigan Campaign Finance Act requiring disclosure prior to an election of the sources of funding for all expenditures for electioneering communications?

RESOLVED, that in order to implement recent United States Supreme Court decisions in *Caperton v. Massey Coal Co.* and *Citizens United v. Federal Elections Commission*, the Michigan Campaign Finance Act and related statutes should be amended to require disclosure prior to an election of the sources of funding for all expenditures for electioneering communications.

(a) Yes

OR

(b) No