WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND RECUSAL

FROM: Ronald Sklansky, Senior Staff Attorney

RE: Judicial Disqualification and Recusal

DATE: September 9, 2010

This Memo: (1) provides a brief overview of the law relating to judicial disqualification and recusal as affected by the U.S. and Wisconsin Constitutions, the Wisconsin statutes, and the Code of Judicial Conduct; and (2) discusses a recent matter before the Wisconsin Supreme Court that raises additional questions about the procedure used for judicial disqualification and recusal.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the U.S. Constitution provides in part that no state may "deprive any person of life, liberty, or property, without due process of law." The due process concept also can be found in Wis. Const., art. I, s. 1, which provides in part that:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness….

The Wisconsin Supreme Court has noted that a person's right to be tried by an impartial judge is part of the fundamental right to a fair trial guaranteed by the Due Process Clause. However, as the U.S. Supreme Court has recognized, not all questions of judicial qualification involve constitutional validity. In fact, most of these matters do not rise to a constitutional level. Disqualification and recusal statutes normally consist of policy determinations that are matters of legislative discretion. Only in the most extreme cases would a judicial qualification based on general allegations of prejudice or bias be required. [See *In the Interest of Kywanda F.*, 200 Wis. 2d 26, 546 N.W.2d 440, 445 (1996), *recon. den.* 204 Wis. 2d 326, 555 N.W.2d 129 (citing the due process guarantee in the Fifth Amendment to the U.S. Constitution).]

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Again, according to Wisconsin courts, the due process guarantee of a fair trial can be achieved by disqualification or recusal where objective facts reveal an actual bias on the part of a judge (such as a direct, personal, substantial pecuniary interest in an outcome) or where a reasonable person, taking into consideration human psychological tendencies and weaknesses, would conclude that the average judge cannot be trusted to, using a phrase frequently quoted in judicial opinions, "hold the balance nice, clear and true" under all the circumstances. [See *State v. O'Neill*, 2003 WI App 73, 261 Wis. 2d 534, 663 N.W.2d 292; *State v. Carprue*, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31; and *State v. Gudgeon*, 2006 WI App 143, 295 Wis. 2d 189, 720 N.W. 2d 114, *rev. den.* 297 Wis. 2d 320, 724 N.W.2d 204.]

The U.S. Supreme Court recently has made comments similar to those made by Wisconsin courts regarding due process jurisprudence and judicial disqualification and recusal. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S., 129 S. Ct. 2252 (2009), the Court reviewed a situation in which the board chairman and principal officer of a corporation that was subject to a $50 million damages verdict spent approximately $3 million to support a candidate seeking a seat on the Supreme Court of Appeals of West Virginia. The candidate so supported won the election and ultimately formed part of the 3-2 majority reversing the $50 million verdict of the trial court. The *Caperton* opinion stated that a fair trial in a fair tribunal is axiomatic as a basic requirement of due process. While most matters of kinship, bias, state policy, and interest do not rise to a constitutional level and are subject to legislative discretion, due process incorporates common law rules that a judge must recuse himself or herself when a direct, personal, substantial, pecuniary interest exists. Also, there may be circumstances in which experience teaches that the probability of bias is too high to be constitutionally tolerable.

Justice Kennedy, writing for the court in *Caperton*, acknowledged that there was no proof of actual bias on the part of the newly elected justice to the Supreme Court of Appeals of West Virginia. But, because it is very difficult to determine actual bias, Justice Kennedy stated that instead of relying on personal introspection or appellate review of actual bias, due process requires an objective standard not requiring proof of actual bias. In other words, does a particular interest pose such a risk that a practice must be forbidden under the Due Process Clause? The opinion states:

> 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 election, and the apparent effect such contribution had on the outcome of the election. [*Id.*, 129 S. Ct. at pp. 2263-4.]

The *Caperton* opinion emphasizes that a due process disqualification of a judge will come into play only in rare cases. The need for public respect of the judiciary is the reason a state may choose standards more rigorous than due process, distinguishing the constitutional floor set by due process from the ceiling set by common law, statutes, or professional standards set by the bench and the bar. [*Id.*, 129 S. Ct. at p. 2266. See, also, Memo No. 5 to the Special Committee for a more full discussion of the *Caperton* case and the federal disqualification process.]

Disqualification of a Judge

Section 759.19 (2), Stats., provides that a judge must disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

1. When a judge is related to any party or counsel thereto or their spouses within the third degree of kinship.

2. In general, when a judge is a party or a material witness.

3. When a judge previously acted as counsel to any party in the same action or proceeding.

4. When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.

5. When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

6. When a judge has a significant financial or personal interest in the outcome of the matter.

7. When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

In s. 757.19, Stats., the term "judge" includes Supreme Court justices, court of appeals judges, circuit court judges, and municipal judges. A disqualification may be waived under the statute by agreement of all parties and the judge after a full and complete disclosure on the record of the factors creating the disqualification. Absent a waiver, a disqualification must occur when the factors creating the disqualification first become known to the judge. The disqualified judge must file in writing the reasons for the disqualification and a new judge will be assigned. [See s. 757.19 (1), (3), (4), and (5), Stats.]

Section 757.19 (6), Stats., provides that, in addition to other remedies, an alleged violation of the statute or the abuse of the disqualification procedure must be referred to the Judicial Commission for possible discipline. An additional remedy to which the statute may refer is that if the disqualification statute is violated, a decision or judgment rendered by a judge will be considered void and a new proceeding will be ordered. [See *Gudgeon*, cited above, and *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390 (1898), rehearing at 74 N.W. 220.]

The Wisconsin Supreme Court has held that the conditions in s. 757.19 (2) (a) to (f), Stats. (items 1. to 6., above), are objective standards that if proven require a judge to recuse himself or herself from an action or a proceeding. In comparison, s. 757.19 (2) (g), Stats., which requires recusal when a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner, is entirely a subjective determination made by the judge. When a judge's refusal to disqualify himself or herself under this standard is made, the only question before a reviewing court is whether the record shows that the judge made this determination; there is no further investigation of the judge's thought process and no consideration of what a reasonable person might believe. [See *State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1983), *cert. den.* 106 U.S. 546, 474 S. Ct. 1013; and *State v. American TV and Appliance of Madison, Inc.*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989).]

The reluctance to go beyond a judge's statement that he or she can act in an impartial manner is reflected in the following statement from *Hungerford v. Cushing*, 2 Wis. 397 (1853):

> A scene cannot well be imagined, which would be more disgraceful to a court, or better calculated to bring contempt and ridicule upon it, than a trial of such a question.... If the testimony contained in the affidavits of the parties is to prevail, regardless of the actual feelings of the judge, his private and social relations, his friendships, his animosities, real or supposed, expressions which he may have made heedlessly in relation to the parties or some one of them, his private conversation, and the interests of his friends, all would be made the subjects of judicial investigation before himself, and any opinion which he might form upon such testimony, would be subject to review by this court. [*Id.*, 2 Wis. at p. 406.]

Code of Judicial Conduct

The Code of Judicial Conduct is contained in ch. 60 of the Supreme Court rules. Section SCR 60.03 (1) provides, in part, that a judge must act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary. The Judicial Council comment to this provision states that the test for appearance of impropriety is an objective test: whether the conduct of the judge would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

In contrast to the subjective test for disqualification contained in s. 757.19 (2) (g), Stats., s. SCR 60.04 (4) combines both a subjective and an objective test to determine whether a judge should recuse himself or herself. Generally, the code provision requires a judge to recuse himself or herself in a proceeding when: (1) the facts and circumstances the judge knows or reasonably should know establish a specified conflict; or (2) when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial. The following conflicts are left to the judge's determination:

1. The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

2. The judge of an appellate court previously handled the action or proceeding of another court.

3. The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such an association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter.

4. The judge knows that he or she, or a specified relative, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than minor interest that could be substantially affected by the proceeding.

5. The judge or one of specified relatives is a party to the proceeding or an officer, director, or trustee of a party; is acting as a lawyer in the proceeding; is known by the judge to have more than a minor interest that could be substantially affected by the proceeding; or is to the judge's knowledge, likely to be a material witness in the proceeding.

6. The judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding or with respect to a controversy in the proceeding.

A critical difference between the operation of the Code of Judicial Conduct and s. 757.19, Stats., is that a violation of the code may result in some form of discipline through the Judicial Commission process, while a violation of s. 757.19, Stats., will result, in the absence of a waiver, in the replacement of a judge and may result in a determination that a proceeding is void and a referral to the Judicial Commission. Thus, a violation of the code's recusal requirement based on an objective standard (when reasonable, well-informed persons…question the judge's ability to be impartial) might end with the imposition of discipline, but will not require that a judge be removed from a particular case or that an order be vacated. [See *American TV*, 443 N.W.2d at pp. 665-7, and *State v. Carviou*, 154 Wis. 2d 641, 454 N.W.2d 562, 563 (Ct. App. 1990), *rev. den.*, 457 N.W.2d 325 (a violation of the code is not grounds for recusal under s. 757.19 (2), Stats.).]

On July 7, 2010, the Supreme Court, at 2010 WI 73, adopted amendments to the recusal rules contained in the Code of Judicial Conduct. The order accomplished the following:

1. Created s. SCR 60.04 (7) to provide that a judge is not required to recuse himself or herself based solely on any endorsement or the judge's campaign committee's request of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.

2. Created s. SCR 60.04 (8) to provide that a judge is not required to recuse himself or herself where the recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

3. Amended s. SCR 60.06 (4) to provide that a judge's campaign committee is not prohibited from soliciting and accepting lawful campaign contributions from individuals or entities even though the contributor may be involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate. [In her dissent to the order, Justice Bradley made the following comment: "Justice Prosser clarified at the January 21, 2010 open administrative conference that indeed the intent [of this amendment] is to allow for the solicitation and receipt of a contribution from a litigant with a case currently pending before the judge." However, a footnote to this statement indicates that it is not clear "that the members of the majority are in agreement about the meaning and effect of this new rule." According to the footnote, Justice Prosser recognizes that under some circumstances, receipt of a lawful campaign contribution could require a judge's recusal, while it appears that Justice Gableman believes that a lawful campaign contribution may never require recusal.

See, in the July 7, 2010 order of the Supreme Court, par. 29 and footnote 6 of Justice Bradley's dissent.]

The recent amendments to the Code of Judicial Conduct were supported by the majority of the Court based on its understanding of the fundamental right of Wisconsin's citizens to exercise the vote:

> We elect judges in Wisconsin; therefore, judicial recusal rules have the potential to impact the effectiveness of citizens' votes cast for judges. Stated otherwise, when a judge is disqualified from participation, the votes of all who voted to elect that judge are cancelled for all issues presented by that case. Accordingly, recusal rules, such as SCR 60.04 (7), must be narrowly tailored to meet a compelling state interest.
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> This court was mindful of the obligations created by the state and federal constitutions as well as the public's concern for the effect of money in judicial races, when it enacted SCR 60.04 (7). The wording of the Supreme Court Rule accommodates those interests by providing that a judge is not required to recuse himself or herself "based solely on" a lawful campaign contribution." (Emphasis added.) The precision in SCR 60.04 (7)'s language creates a rule that is narrowly tailored; yet, the rule does not limit recusal when a lawful contribution is combined with some objectionable action, such as a contribution made in exchange for a judge's vote on an issue of interest to the contributor. [See the July 7, 2010 order of the Supreme Court and Justice Roggensack's concurrence at pars. 11 and 12; citations omitted.]

Justice Bradley's dissent to the Supreme Court order of July 7, 2010 argues that the amendments to the Code of Judicial Conduct will harm the public's confidence in the integrity and impartiality of the judiciary, are not clearly stated, and merit further examination and study.

AN ADDITIONAL LEGAL DISPUTE

The current members of the Wisconsin Supreme Court appear to be divided over the following additional issues relating to judicial disqualification and recusal:

1. Does the court have jurisdiction to decide recusal motions challenging, on a due process basis, the participation of a justice in a particular case?

2. Should an objective standard be used to determine when a judge appears to be unable to act impartially?

In *State v. Allen*, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863, the appellant moved for the disqualification of Justice Gableman both on due process grounds and the rule contained in s. 757.19 (2) (g), Stats., regarding his inability to act impartially. After Justice Gableman removed himself from the proceeding, the motion failed to be granted on a 3-3 vote. Chief Justice Abrahamson, along with Justices Bradley and Crooks, supported an order for further briefing on a number of topics including whether the court has jurisdiction to decide recusal motions challenging the participation of a justice in a

particular case. These three justices appeared to lean toward the conclusion that the Supreme Court may disqualify a fellow member based on past precedent and the inherent powers of the Court. [*Id.*, 778 N.W.2d at 873.] On the other side, Justice Roggensack contended that a majority of the Court does not have the power to disqualify a fellow justice, also basing her opinion on past precedent and the current structure of the Wisconsin Constitution. [See, also, *State v. Henley*, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853, for additional remarks on this subject by Justice Roggensack.]

With respect to the use of an objective person standard to determine whether an appearance of impartiality should result in a disqualification or recusal, Chief Justice Abrahamson appears to argue in *Allen* that a *Caperton*-like test should be used. "A judge's own inquiry into actual bias is not adequate for due process purposes." [*Id.*, 778 N.W.2d at 881.] Apparently, this test would be used in more than the extreme cases discussed in *Caperton*. [The Chief Justice asks the additional questions of when and how a litigant should move for recusal; whether oral arguments or briefs affect the timing or procedure of such a motion; and whether a justice should provide reasons for a recusal. See *Allen*, at 778 N.W.2d at pp. 895-6.]

Justices Roggensack and Prosser contend that the expansion of the process by which a judge may be disqualified or subject to recusal will damage the court. Justice Roggensack has stated that "Motions to disqualify a justice of this court from participation in pending cases have become motions de jour." These motions raise serious concerns for an individual justice and institutional concerns for the court and undermine public trust and confidence in the justice's integrity and the decisions of the court. [See *Henley*, 778 N.W.2d at p. 861 and *Allen*, 778 N.W.2d at p. 920.] Justice Prosser has argued that a process by which justices can exclude a colleague will nullify election results and gravely damage the court. He has stated that "The number and savagery of these motions is unprecedented and amounts to a frontal assault on this court." [See *Allen*, 778 N.W.2d at pp. 923-4.]

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