Joint Legislative Council's
Special Committee On Judicial Discipline and Recusal

Testimony of
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Chairman Hebl, Vice Chairman Grothman, and members of the Committee, thank you for inviting me to address you today.

I want to focus primarily on one narrow aspect of the problem of judicial recusal, and that is what procedure to use when questions of recusal and disqualification arise with regard to supreme court justices. More precisely, I want to focus on the question of who should decide those motions, and whether decisions of individual justices should be reviewable by the full court (or anyone else).

This is an issue that should not be political—it favors no faction, no group of justices. It could apply equally to any justice.

To make it as non-political as possible, I want to start with what I think should be the easiest case—by focusing on the grounds for disqualification set forth in Wis. Stat. § 757.19 which, as the Supreme Court declared in State v. American TV & Appliance of Madison, Inc., 151 Wis.2d 175, 443 N.W.2d 662 (1989), are objective. I am not talking about the basis for disqualification under § 757.19(2)(g) that asks whether a judge or justice has "determined that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner," and which *American TV* found to be subjective. I am not talking about the grounds that underlie the challenges to Justice Gableman based on claims of bias against criminal defendants. Rather, I want to start by focusing on the other bases in § 757.19(2) that the Supreme Court in *American TV* has already said are purely objective, including:

(a) "When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship."

(b) "When a judge is a party or a material witness..."

(c) "When a judge previously acted as counsel to any part in the same action or proceeding."

(d) "When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue."

(e) "When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court."

(f) "When a judge has a significant financial or personal interest in the outcome of the matter."

These objective criteria are just that—objective. They can be ascertained without peering inside the challenged justice's mind, based on objectively verifiable facts. The question under these criteria, then, is should a single justice alone decide these facts about themselves, or about how these rules apply to themselves? Or should these criteria be decided by the full court?

In any other context, answer would be easy and clear—one cannot decide one's own case. It is the antithesis of a fair system of justice for a participant charged with bias to be the sole arbiter of that bias. In the worst case scenario, a truly biased judge could express that bias by refusing to get off the case. Unless there were review by other judges, nothing would prevent such unfairness.

More realistically or at least more typically, challenged justices might be unable or unwilling to recognize their own biases because they are human. They might fail to recognize their own bias not out of maliciousness, but because it is hard, indeed, virtually impossible, to be truly neutral about one's self.

Chief Justice Abrahamson expressed this sentiment well in *State v. Allen,* 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863: "It is not much comfort to ... [a] litigant to have the challenged Justice be judge of his or her own impartiality." *Id.* at ¶ 86, fn. 55. "Asking the justice whose impartiality has been challenged to provide the only and final word as to whether he or she is in fact impartial makes little sense. That an independent judge is to decide matters presented to a tribunal is central to our normal concepts of due process." *Id.* at¶95.

We therefore need a system that makes clear that recusal and disqualification decisions on objective disqualification criteria must be subject to review by judges other than just the challenged judge or justice him or herself. But currently, the Supreme Court is split on whether that authority exists with regard to Supreme Court justices.

In the interest of full disclosure, I must tell you that my own concern about this was raised by my experience this past term in Supreme Court. I represented the defendant, Dimitri Henley, in *State v. Henley*, 2010 WI 97, which involved a recusal motion. This was not one of the cases involving a challenge to Justice Gableman. It did not involve a claim that a justice was subjectively biased, or a claim based on any alleged attitudes about criminal defendants, as in the Gableman cases. Rather, the case involved a claim that Justice Roggensack was statutorily disqualified because she had participated in the case while in the court of appeals—the kind of challenge that could be brought in the future, theoretically, against justices from any political perspective.

The disqualification request was based on the fact that Henley and his codefendant were convicted at a joint trial that included identical charges, the same defense, the same evidence, and a single, joint trial court record. Although the case was tried as a single case in the circuit court, both defendants appealed separately,

in their own names. Justice Roggensack sat on the court of appeals panel that decided the codefendant's appeal, and that decided some of the same issues, on precisely the same joint record from the joint trial, as were at issue in Mr. Henley's subsequent appellate proceedings.

Because it appeared that Justice Roggensack had thus already decided some of the issues in this very case while in the court of appeals, we moved to disqualify her under 757.19(2) (e), which requires disqualification: "When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court."

Justice Roggensack denied the motion for disqualification, concluding that as a matter of law the two appeals were not same action or proceeding. The point is debatable. I think she's wrong, but I'm not here to challenge that decision itself.

Rather, my concern is what happened next. Because I believed Justice Roggensack erred, I moved the full court to determine whether, as a matter of law, she was statutorily disqualified. The court did not resolve that legal question, but instead split 3-3 on whether it could decide the matter and disqualify Justice Roggensack. To my surprise, a majority of the court did not agree that the full court had the authority to interpret and apply the objective statutory criterion for disqualification at issue. The result in this case was that only the challenged justice herself could vote on the meaning of the statute. The others were left without any authority to weigh in on the interpretation or application of the statutory criterion.

We need a rule to clarify this apparent ambiguity in the law, to make clear that a fair system of justice requires a procedure where no judge's own assessment of the applicability of objective standards for disqualification can be decided only by that judge or justice herself, with no oversight or review whatsoever.

Indeed, the importance of review of a judge's decision may itself be compelled by due process—the need for effective review is one of the reasons the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.,* 129 S.Ct. 2252 (2009), held that the due process standard for disqualification for bias must be an objective one. The Court explained that"[t]he judge's own inquiry into actual bias, then, is not one that the law can easily *superintend or review...." Id.* at 2263 (emphasis added). Indeed, former Michigan Chief Justice Clifford Taylor has declared that "*Caperton* has to mean that the challenged justice can't make the recusal decision alone." *U.S. Fidelity Ins. & Guarantee Co. v. Michigan Catastrophic Claims Ass'n*, 773 N.W.2d 243, 246 n.12 (2009) (quoting *MSC recusal rule may not be constitutional,* Michigan Lawyers Weekly, June 15, 2009, p. 23).

Arguments for and against Review by the Full Court

The primary argument against permitting the full court to decide disqualification motions appears to be based on past practices—the full court has rarely weighed in to remove one of its own members from a case. But past practices

are not law—they neither create nor depend upon a rule of law. Moreover, past practices are not so clear as that argument supposes—the full court has indeed decided whether a single member of the court had to be disqualified. *See, e.g, Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390 (1897) (after issuing decision on the merits of the case, the court vacated its judgment because it concluded that one of the participating justices, who had since died, should have been disqualified and was wrong in his own judgment that he could participate in the case).

A second theme in the debates about whether the full court can disqualify a member in a given case is the contention that disqualification deprives the voters of the effect of their votes. But that is no more true when the full court disqualifies a justice than if the justice herself chooses to recuse herself. That argument is an argument against ever disqualifying an elected justice or judge. But once one accepts the necessity of recusal or disqualification in some cases—and *Caperton* as well as § 757.19(2) make clear that disqualification is required in some cases—then respecting the voters is not a reason to leave the decision alone in the hands of the challenged justice. Giving the ultimate decision to the full court rather than an individual justice no more deprives voters of the force of their votes than leaving it to the individual justice.

Moreover, that argument confuses the right to vote at the institutional level—that is, the right to decide who will become a member of the Court as an institution—with the right to vote in individual cases. For all its democratic virtues, a system that elects its justices runs the risk of politicizing individual decisions; such a system must be sensitive to the need to insulate justices from political pressures and ensure their independence in individual cases. The challenge for an elected court is to rise above politics, to ensure that decisions are rendered based solely on the law, and approached from a position of neutrality. To suggest that somehow elections should play a role at the individual case level threatens to inject politics into case-level decisions, rather than shielding justices from them.

On the other hand, consider the problem that is created by leaving disqualification and recusal decisions solely to the challenged justice. In the *Henley* case, Justice Roggensack issued a published opinion denying disqualification, and interpreting the objective criteria set forth in §§ 757.19(2)(e) and (g). *State v. Henley,* 2010 WI 12, 322 Wis.2d 1, 778 N.W.2d 853. Does that decision now become binding precedent on the full court or the lower courts on those questions of statutory interpretation in the future? What happened to the rights of the voters who elected the other six justices? If a justice in the future is not bound by Justice Roggensack's opinion, then we have the potential for conflicting and inconsistent interpretations and applications of a statute. The result is unacceptable: uneven and random administration of justice.

It is partly for this reason, no doubt, that the latest draft of the American Bar Association's Standing Committee on Judicial Independence Report to the House of Delegates, dated July 16, 2010, strongly recommends that each state provide procedures for *review* of recusal decisions. The draft report provides:

"Each State should have in place clearly articulated procedures, whether statutory or judicial rules-based, for the handling of disqualification determinations *and the review of denials of such motions.*" Draft at p. 2.

"The appearance of partiality and the perils of self-serving statutory interpretation suggest that, to the extent logistically feasible, another judge should preside over [disqualification] motions. To permit the judge whose conduct or relationships prompted the motion to decide the motion erodes the necessary public confidence in the integrity of a judicial system which should rely on the presence of a neutral and detached judge to preside over all court proceedings." Draft at p. 17 (quoting Leslie W. Abrahamson, *Deciding Recusal Motions: Who Judges the Judges?* 28 VAL. U. L. REV. 543, 561 (1994).

"Moreover, when a disqualification motion is denied, there should be a clear avenue for prompt review of that decision." Draft at p. 17.

Moving Toward an Objective Standard of Bias

Apart from the question of *who* should have the final say on disqualification motions is the question of whether Wisconsin should abandon its subjective assessment of bias and move to a fully objective test. This question addresses not just those standards that *American TV* has already said are objective (discussed above), but also the remaining question of whether a judge is otherwise biased, or whether there is an appearance of bias. *American TV* says that is a subjective inquiry.

But Wisconsin cannot continue to adhere to that standard without running afoul of the constitution. *Caperton* makes clear that a subjective standard does not comport with due process. In *Caperton* the Court declared that a litigant may be denied due process when "there is a serious risk of actual bias based on *objective* and reasonable perceptions...." 129 S.Ct. at 2263 (emphasis added). Even more directly, the Court asserted: "The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." 129 S.Ct. at 2265. "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" 129 S.Ct. at 2262. And the Court explained that the objective due process test asks whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," or "whether the average judge in his or her position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" 129 S.Ct. at 2257, 2262.

Who will a rule imposing an objective due process standard, and requiring review of a justice's recusal decision by the court, benefit?

We don't know. Such a rule would apply equally to all members of the court of all philosophical and political perspectives.

What we do know is that the winner will be litigants, who will know the fairness of the judges who decide their cases will not be decided solely by those judge's themselves, and the judiciary, because of the enhanced faith and confidence of a public that knows the courts take fairness and impartiality seriously.