

1 **AN ACT** *to create* 757.19 (2) (h) of the statutes; **relating to:** judicial disqualification
2 based on an objective standard.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This draft, relating to judicial disqualification based on an objective standard, was prepared for the Joint Legislative Council's Special Committee on Judicial Discipline and Recusal.

3 **SECTION 1.** 757.19 (2) (h) of the statutes is created to read:

4 757.19 (2) (h) When his or her impartiality might reasonably be questioned.

NOTE: Section 757.19 (2), stats., provides that a judge must disqualify himself or herself from any civil or criminal action or proceeding when, among other things, he or she determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner. The Wisconsin supreme court has held that this provision 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).]

In contrast to the subjective test for disqualification contained in s. 757.19 (2) (g), stats., the code of judicial conduct 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. [See s. SCR 60.04 (4).]

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 disciplinary process, while a violation of s. 757.19, stats., may 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.).]

This SECTION, incorporating similar federal statutory language contained in 28 U.S.C. s. 455 (a), provides that a judge must disqualify himself or herself from any civil or criminal action or proceeding when his or her impartiality might reasonably be questioned. The U.S. Supreme Court has stated that the "purpose of [28 U.S.C. s. 455 (a)] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible [and that] it is critically important ... to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality." [*Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988).]