STATE OF WISCONSIN
SUPREME COURT
P.O. BOX 1688
MADISON, WISCONSIN
53701-1688

CHAMBERS OF
JUSTICE N. PATRICK CROOKS

STATE CAPITOL, 16 EAST
MADISON, WI 53702
(608) 266-1885
FAX: (608) 261-8299

Summary of testimony: The Wisconsin legislature should amend Wis. Stat. § 757.19(2) to include a provision equivalent to 28 U.S.C. § 455(a) establishing a true objective standard that requires a judge to recuse himself or herself in any proceeding in which his or her impartiality might reasonably be questioned. This objective standard has been adopted by Congress and by the legislatures of 48 states; Wisconsin's standard is outdated and inconsistent with the standards that apply to virtually all the judges in the rest of the country. Creating a statutory objective standard recognizes the constitutional due process rights implicated by the recusal question (as the U.S. Supreme Court did in Caperton), addresses the current difficulties between the state Judicial Code and the interpretation of the existing statute, and, most critically, recognizes that appearances of bias undermine public confidence in the fairness and integrity of Wisconsin's court system.

Outline of testimony of Justice N. Patrick Crooks
Special Committee on Judicial Discipline and Recusal
September 16, 2010

1) The "or it appears" language from § 757.19(2)(g)

The circumstances under which a judge is required to disqualify himself or herself from participation in a case are set forth in Wis. Stat. § 757.19. One of the reasons for disqualifying oneself is an inability to "act in an impartial manner." Wis. Stat. § 757.19(2)(g) ("Any judge shall disqualify himself or herself from any civil or criminal action or proceeding . . . [w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." (emphasis added)). The language of that provision—"or it appears he or she cannot[] act in an impartial manner"— has been interpreted by the Wisconsin Supreme Court as creating a subjective test. That is, under the statute as it is currently interpreted, the question to be answered is whether the judge believes there is an appearance that he or she cannot be impartial.

In American T.V.,[1]: the Wisconsin Supreme Court described the application of Wis. Stat. § 757.19(2)(g) as follows:

> [T]he seventh situation requiring disqualification set forth in sec. 757.19(2), Stats., concerns not what exists in the external world subject to

[1] State v. American TV and Appliance of Madison, Inc., 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989). See also State v. Walberg, 109 Wis. 2d 96, 105-06, 325 N.W.2d 687 (1982).

> objective determination, but what exists in the judge's mind. Subsection (g) requires disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." The determination of a basis for disqualification here is subjective.
>
> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification, as the State contends, in a situation in which the judge's impartiality "can reasonably be questioned" by someone other than the judge. (emphasis added)

2) Wis. Stat. § 757.19 needs to include an objective standard for recusal

There are currently two operative standards for judges—one in the existing statute and one in a section in the judicial code—and the standards are not consistent. The Wisconsin Code of Judicial Conduct at SCR 60.04(4) creates an objective standard.[2] As the material provided by the Legislative Council staff attorneys points out, there is "a critical difference" in the way the two codes operate. "[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." Wis. Leg. Council Staff Memorandum, Memo No. 4, Sept. 9, 2010, at 5. This confusion and the potential the discrepancy creates for illogical results—that a party whose case is improperly ruled on by a judge who should have recused himself or herself has no relief from the court's orders in the case other than to see the judge disciplined—should be corrected by bringing the statute into conformity with the standard in the judicial code at SCR 60.04(4).

Amending the statute to include a true objective standard would ensure that when a recusal motion is brought based on a judge's having received campaign contributions, the motion would be evaluated under an objective test rather than the judge's subjective determination. This is especially necessary given the recent adoption of SCR 60.04(7), which provides that a judge "shall not be required to recuse himself or herself in a proceeding based solely on . . . the judge's campaign committee's receipt of a lawful campaign contribution from an individual or entity involved in the proceeding."

[2] "Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding . . . 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 . . . ." SCR 60.04(4).

3) Consequences for a violation of § 757.19

If there is a violation of 757.19, the result, if there is no waiver of the issue, is replacement of the judge on the case. A violation may result in a determination that the proceeding in question is void and may result in a referral to the Judicial Commission for discipline. (The Preamble to SCR Ch. 60, Code of Judicial Conduct, states, "When the text of a rule uses 'shall,' 'shall not' or 'may not,' it is intended to impose binding obligations the violation of which can result in disciplinary action." The text of SCR 60.04(4) sets forth the circumstances under which a judge "shall recuse himself or herself"; thus, a violation of that rule is subject to disciplinary action.)

4) Establishing a true objective standard

Wis. Stat. § 757.19(2) should be amended to include a provision equivalent to that in 28 U.S.C. § 455(a), which reads:

> 28 U.S. § 455. Disqualification of justice, judge, or magistrate judge
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Such a provision could be inserted as 757.19(2)(h) and read:

> 757.19. Disqualification of judge
> (1) In this section, “judge” includes the supreme court justices, court of appeals judges, circuit court judges and municipal judges.
> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
> . . .
> (h) when his or her impartiality might reasonably be questioned.

5) Legislative history of 28 U.S.C. § 455(a)

S. 1064, a bill passed in 1974, included a series of amendments to 28 U.S.C. § 455. I reviewed the extensive legislative history of the provision that creates the "might reasonably be questioned" standard. The legislative history shows that the purpose of the bill generally was to "mak[e] the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the Code of Judicial Conduct which relates to disqualification of judges for bias, prejudice or conflict of interest."[3] The House Committee on the Judiciary's report recommending passage of the bill notes that the existing statutory and ethical provisions governing recusal of federal judges were "indefinite and ambiguous, but also, in certain situations, conflicting." The report noted:

[3] H.R. Rep. No. 93-1453, at 1 (1974).

> The existence of dual standards, statutory and ethical, couched in uncertain language has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril. He was occasionally subjected to a criticism by others who necessarily had the benefit of hind sight. The effect of the existing situation is not only to place the judge on the horns of a dilemma but, in some circumstances, to weaken public confidence in the judicial system.[4]

The report included an endorsement of the provision by the U.S. Department of Justice,[5] which included the following observation:

> Subsection (a) of proposed section 455 . . . sets up a more objective standard than the existing statute where the judge's own opinion is the deciding standard. . . .
>
> By making both the statutory and ethical standards of conduct virtually identical, Federal judges would no longer be subject to dual standards governing their qualifications to sit in a particular proceeding. . . . S. 1064 represents a salutary advance in the development of the administration of justice. . . . The Department of Justice recommends enactment of this legislation, amended as suggested above [to require timely filing of motions for recusal].

6) ABA Draft, Standing Committee on Judicial Independence

I draw the Committee's attention to the information in footnote 7 of the July 16, 2010, draft recommendation from the ABA's Standing Committee on Judicial Independence, which is included with the materials provided to the Committee today:

> This [the standard requiring recusal where a judge's "impartiality might reasonably be called into question"] is the current default standard in the ABA Model Code of Judicial Conduct and has been adopted in nearly all the states. Forty-five states have actually adopted it virtually *in haec verba*. (It is also the federal standard. *See* 28 U.S.C. § 455(a).) Another three states have adopted essentially the same rule . . . .

Unfortunately, Wisconsin is conspicuous by its absence from this list. As the ABA Committee's draft recommendation notes, Wisconsin is even more noticeably out of step with national standards given the adoption of the new rule that a campaign contribution to a judge is not sufficient to require recusal, which stands in stark contrast to the principles set forth by the Supreme Court in Caperton concerning the possibility that due process violations occur when a judge who has received campaign contributions from an interested party insists on participating in a case.

[4] H.R. Rep. No. 93-1453, at 2 (1974).
[5] Id. at 8.

7) Other related statutory amendments

The legislature may decide to clarify the statutes with respect to how a party is to alert a judge that factors exist to justify recusal and whether it is necessary to provide for expedited review of a judge's refusal to disqualify himself or herself. I take no position on those matters and believe that the legislature is well equipped to make those determinations.

8) The materials provided by Legislative Council staff for this hearing

Finally, I commend the staff of the Legislative Council for the excellent memos and background materials provided. I appreciated the thorough work and believe the materials will be very helpful to the members of the Special Committee.