Protecting Justice for all Since 1977

Wisconsin State Public Defender

315 N. Henry St. - 2nd Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wisspd.org

Nicholas L. Chiarkas
State Public Defender

Kelli S. Thompson
Deputy State Public Defender

TESTIMONY BEFORE THE
JOINT LEGISLATIVE COUNCIL SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND RECUSAL
SEPTEMBER 16, 2010

Good morning. I am Marla Stephens and I currently serve as the Appellate Division Director for the Office of the Wisconsin State Public Defender.

I would like to address the processes that ensure due process in judicial disqualification matters.

I speak on behalf of the Wisconsin State Public Defender. We represent the litigants who cannot afford to make campaign contributions. We represent the litigants who have lost their right to vote. We represent the litigants who are the scapegoats in increasingly political campaigns for judicial election. Liberty in this country depends upon judges who are willing to uphold their sworn duty to protect the rights of the minority against the majority, to uphold the Constitution and the Bill of Rights, especially the Fourth, Fifth and Sixth Amendments. Yet we see the difficult rulings in this context cynically manipulated to put an electoral bulls eye on a judge's back.

In response to statements made by a candidate for the Wisconsin supreme court in advertisements and a related judicial disciplinary proceeding, criminal defense lawyers filed several recusal requests and disqualification motions. The subject justice's campaign ad implied that criminal defense attorneys are unfit to serve as supreme court justices because they are willing to make legal arguments ("find loopholes") on behalf of despicable people and to "subvert the criminal –our system of criminal – bringing criminals to account." He questioned the value of providing counsel to all accused defendants, by explaining through his own counsel that, his opponent, a former public defender/criminal defense attorney, "didn't have to take that criminal [case]…. I mean, don't you have standards?"

This went beyond standard "tough on crime" campaign rhetoric.

The justice's comments were swiftly condemned by the criminal justice system – defenders, prosecutors and judges - and the legal profession as a whole. (*See* attached State Bar of Wisconsin Public Policy Position on the Right to Counsel and Criminal Law Section Board memorandum "Request for a State Bar position on the integrity of the justice system.")

The recusal requests were filed under two legal theories. (*See* Legislative Council Staff Memo No. 4 at 6-7.) The first was the judicial disqualification statute, Wis. Stat. sec. 757.19 (2) (g) which states that "[a]ny judge shall disqualify himself or herself when…a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This decision belongs to the judge alone under current law. The self-disqualification question is subjective and review is limited to determining whether the judge concluded

disqualification was necessary. *State v. American TV & Appliance*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989). The justice determined that he could be impartial in every case.
The second ground for judicial disqualification was based on the constitutional guarantee of due process of law, which includes the right to a fair hearing before a fair decision maker. It asked the court, not the individual justice, to determine whether the justice appeared to be unable to act in an impartial manner. The court was unable to reach a decision on this question because, after the challenged justice removed himself from the deliberations, there was a 3-3 split in 142 pages of dueling opinions over the threshold question whether an individual justice's disqualification could be submitted to the court as a whole.

The split in the court helps us to frame the issues we must address for future litigants. As we see them, they are:

1. We must adopt an objective standard to determine when a judge's impartiality might reasonably be questioned.

We believe that due process requires an objective review of the justice's determination that he or she can rule fairly in the case, or of the justice's determination whether there is an appearance that he or she cannot be impartial in the case. This harkens back to first principles – at common law a judge was called upon to recuse himself when he would otherwise be "a judge in his own case."[1]

An objective standard would require any judge to disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned. *See* 28 U.S.C.A. § 455 (a). It is the "reasonableness" component of the review standard that makes it objective and that guarantees a litigant the process that is due to ensure a fair tribunal.

We should evaluate whether a judge's impartiality might reasonably be questioned from the perspective of a reasonable, well-informed person – and not from the perspective of the litigants, the judge, or the media. Whether the judge thinks he or she can be impartial is relevant to whether he or she is biased in fact, but it does not resolve whether his or her impartiality might reasonably be questioned. The question becomes: could a reasonable person object to, or have concerns about, the judge's impartiality under the circumstances?

2. We must eliminate our reliance upon the subject judge to make the fitness determination.

When a non-frivolous question arises about a judge's ability to be impartial, having that judge decide his or her own fitness may undermine public confidence in the impartiality of the judicial process to a greater extent than countenancing any challenge to the presumption of judicial impartiality presents.

Relieving judges of the duty to make the determination whether they are qualified to sit is not necessarily inconsistent with the presumption of impartiality. Judges who are truly committed to rendering impartial justice must be committed to the appearance and the reality of justice. It

[1] *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (1609).

should not matter whether it is he or she or a fellow justice who sits in judgment in a particular appeal. A Milwaukee trial judge observed that if judges are truly committed to the impartiality of their judiciary, they should be indifferent to which of their number tries a given case, and if a litigant is uncomfortable with an assigned judge, enabling a litigant to substitute simply underscores the judiciary's collective commitment to impartial justice.[2]

There are several ways in which this can be accomplished. The judge who is asked to disqualify himself or herself may be limited to two options – either grant the request or send it to the chief judge for determination. The chief judge may then decide the request or refer it to another body for determination. The chief judge may choose one or an odd number of unchallenged sitting justices by lot to determine the request. The chief judge may chose one or an odd number of retired justices by lot to determine the request. The chief judge may impanel a recusal review board, or ask the Government Accountability Board, to evaluate the request and make a recommendation to the chief judge. If the request is sent to the rest of the court for determination, and the remaining justices deadlock, the challenged judge should be disqualified.

We ask the committee to propose one of these processes, and ensure that it is designed to result in a decision, not a draw.

3. We must adopt procedures for review of decisions concerning disqualification of appellate court judges and clearer standards.

The committee should repudiate the conclusion of three of the justices that "a majority of the justices on this court do not have the power to disqualify a fellow justice from participation in a proceeding before this court." *State v. Allen*, 2010 WI 10, ¶ 207. The new rules should allow the supreme court to review an individual justice's decision not to recuse.

The individual justices should be required to render recusal decisions in writing, both to assist in timely review and to allow the court to collect data on the reasons for recusal and disqualification. The collection of data will develop a body of law to which judges can refer when evaluating the merits of disqualification motions.

If the claim that a justice appears to be partial is based upon public statements (including but not limited to statements expressly or impliedly promising or committing to reach a particular result), relevant questions for the reviewing justices will include:[3]

•Whether the remarks indicate prejudgment of a party, lawyer, witness or issue: if a judge states an intention to rule in a particular way (such as by characterizing constitutional legal arguments as "loopholes") before a matter is heard, it may call the judge's impartiality into question.

•The context and timing of the remarks: When a judge's remarks about a party, issue, etc., before the court are made on the record, in a judicial proceeding and in light of the evidence presented, they are less likely to raise doubts about the judge's impartiality than

[2] *ABA Draft Report of the Judicial Disqualification Project*, Sept. 2008, at 63.
[3] *Ibid*. at 83.

when the remarks are offered in an extrajudicial context, before the case is heard. (Take, for example, the words of Richard Neely, an elected justice in West Virginia, who wrote "[a]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security."[4])

•The tenor of the remarks: When a judge's remarks are so intemperate or excessive as to suggest that the judge may harbor an extrajudicial bias, it may call the judge's impartiality into question.

4. We must allow for the replacement of a supreme court justice who is recused, disqualified or incapacitated.

Replacement of a justice who voluntarily recuses him or herself, or a justice who is disqualified or incapacitated, is the only way to prevent future deadlocks, or loss of jurisdiction for want of a quorum. This process also undercuts any argument that disqualification requests will be used only as a method of judge-shopping, since the litigant challenging the impartiality of a particular justice will not have the ability to control the make-up of the panel that will decide his or her case.

We believe that retired justices should be allowed to sit under these circumstances and support a constitutional amendment to make that possible.

Conclusion

The Code of Judicial Conduct subjects judges to discipline for misconduct, but it does not provide relief to the litigants who are harmed when judges fail to disqualify themselves in pending litigation.

Recusal and disqualification rules can be a useful tool for balancing judicial free speech and the right to an impartial forum, if we design them to do so. They are narrowly tailored to the potentially compelling interest of judicial impartiality, in a way that restraints on judicial speech contained in judicial canons are not.

They can also shield judges seeking re-election from political attacks for making legally correct but politically unpopular decisions. Again and again, judicial elections come down to accusations that an incumbent is soft on crime, and studies show that elected judges become notably harder on criminal defendants as elections approach.

Thank you for considering our views.

[4] *Small Steps: The Road to Prosperity Runs Through the Judiciary*, THE ECONOMIST, Jan. 21, 2010.