

**Remarks of Chief Justice Shirley S. Abrahamson**  
**Special Committee on Judicial Discipline and Recusal**  
**Thursday, September 16, 2010**  
**State Capitol: 328 Northwest**

Good morning Chairman Hebl, Vice-Chairman Grothman and members of the committee. I appreciate your giving me the opportunity to address you.

Last week our nation marked the anniversary of 9-11. That terrorist attack changed us in a multitude of ways and sharpened our focus on protecting ourselves from violence. We have recognized our vulnerability and have taken steps to strengthen and protect ourselves to secure the freedoms that we hold so dear.

Securing justice is also important in our democracy. We must safeguard the right of every individual to have his or her dispute decided fairly and impartially, irrespective of the identity of the plaintiff or the name of the defendant or the nature of the cause.

What is needed to safeguard justice and to fulfill the promise of equal protection and due process cannot be accomplished by armed security checkpoints or purchased or programmed into a computer. What is needed is transparency and accountability. For only a system that is open can assure the public that the law will be applied evenly to all, regardless of race, religion, gender, economic status,

or political connection. The integrity of our legal system requires no less.

So how do we proceed? I am glad you asked.

The Committee has two important subjects before it relating to fair proceedings--Discipline and Recusal. You addressed Discipline last month and, as I explained, I could not attend. Thank you for allowing me to address this subject today. I shall then address recusal.

### **JUDICIAL DISCIPLINE**

I shall first speak briefly of Discipline. As your excellent Memo No. 1 notes, discipline is governed by Art. VII, sec. 11, which provides as follows: Each justice or judge shall be disciplined "by the supreme court pursuant to procedures established by the legislature by law."

In accordance with the power vested by the Constitution, the legislature has established procedures for judicial discipline. See secs. 757.81-757.99, Wis. Stat., creating the Judicial Commission, the court of appeals panel, and the procedures for the Supreme Court. This process has, as a whole, functioned well. Nevertheless, cracks in the process are evident.

It is clear, as James Alexander pointed out, that problems will arise when a panel composed of court of appeals judges is appointed to sit in judgment of a court of appeals judge. This problem has not yet surfaced, but you know it's just a matter of time. The legislature might

consider providing that the panel in such instances be composed of circuit court judges or others.

The lack of public input during the investigation stage and the secrecy in the Judicial Commission's internal proceedings have been criticized. These closed proceedings are matters of public policy for the legislature. (Our court in lawyer discipline cases, like the legislature in judicial discipline cases, keeps the process closed until the complaint is filed). Mr. McCabe's comments about lack of public input during the panel's proceedings might be addressed by providing for amicus briefs to be filed with the panel.

Another issue is what should be done when the specter of an equally divided Supreme Court sits on a judicial discipline case. Obviously the Court will have an equal number of justices when the subject of the discipline action is a Justice.

The impression you may have is that this is a new issue and that it is not likely to arise. This impression is not accurate.

Rather, the issue of what happens when the Supreme Court is equally divided was raised in 1988, more than 20 years ago. During that time then-Justice William Bablitch was being investigated by the Judicial Commission, and the Judicial Commission clearly saw the possibility of an evenly divided court with only 6 justices sitting. The Judicial Commission sought the assistance of the Judicial Council.

The Judicial Council studied the question presented, and in 1990, the Judicial Council offered to assist the Court in devising a procedure for the discipline of a justice to respond to the following concerns:

(A) the absence of a quorum in the event that four justices recuse themselves (which actually occurred several years ago in a case involving then Justice Jon Wilcox);

(B) an equally divided Court when the justice who is the subject of the discipline proceeding recuses himself or herself or when a justice recuses himself or herself for any reason in a judicial discipline case;

(C) the appearance of impropriety when members of the Court sit in judgment of a professional peer whom they know well and work with on a daily basis; and

(D) the burden on each individual justice and on the Court as an institution when the Justices sit in judgment of a professional peer, especially a fellow justice.

I am filing, for your assistance, the 1988-90 material from the Judicial Council.<sup>1</sup>

Unfortunately, the Court never responded to the Judicial Council's 1990 offer, and the Court, although it was alerted to the issues, never addressed them. Instead, you and the Court are facing these issues (and other issues) today.

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<sup>1</sup> I referred to this material in my decision in Matter of Disciplinary Proceedings Against Crosetto, 160 Wis. 2d 581, 602, 466 N.W.2d 879 (1991), which is reprinted in State v. Allen, 2010 WI 10, 322 Wis. 2d 372, 778 NW2d 863.

Several changes in the statutory procedure for discipline might be considered. I do not purport to list all of them. For example,

(A) Establish separate procedures for discipline of circuit court judges, court of appeals judges, and supreme court justices;

(B) Limit the scope of Supreme Court review of a panel's recommendation of facts or law;

(C) Provide only for jury decisions, not a panel, and limit the scope of Supreme Court review;

(D) Allow a jury decision on the issues of violation and sanction after the Court evenly divides;

(E) Add a circuit court or court of appeals judge to the Supreme Court for purposes of deciding discipline cases to avoid an even number of justices;

(F) Select by lot a justice who will remove himself or herself if an even number of Justices are sitting on the discipline case;

(G) Establish a "discipline tribunal" to decide all judicial discipline cases. Various ideas have been put forth for the composition of such a tribunal.

Each "solution" has, I am sure, weaknesses and strengths. Solutions may require different statutory or constitutional revisions. Grappling with the issues that have been raised about discipline and working at change are, however, needed. The cracks in the system are visible. We all should try to fill them.

## RECUSAL

I turn now to the subject of recusal, sometimes referred to as disqualification. Your staff has prepared excellent, informative memoranda on this subject.

You may ask "why deal with recusal now?" There are several answers to that question.

First, the need to reform the recusal process is not new, although the need has become more pressing. Twenty years ago, I wrote a dissent in a case involving a lawyer accused of misconduct. The lawyer requested each member to disqualify himself or herself from sitting on his case. In that dissent, I urged my colleagues to take up the issue of judicial recusal, citing a statistic that today seems rather quaint: I wrote--"The issue of recusal of a justice has arisen at least three times in this court in the last 18 months."<sup>2</sup>

I say "quaint" because in the last 18 months the Court has had as many as 10 motions addressed to the Court to disqualify a Justice from sitting on a pending case.<sup>3</sup> Indeed, within the last few weeks, a lawyer filed a motion for reconsideration of a case on the ground that a justice

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<sup>2</sup> Matter of Disciplinary Proceedings Against Crosetto, 160 Wis. 2d 581, 602, 466 N.W.2d 879 (1991).

<sup>3</sup> See, e.g., State v. Carter, State v. Cross, State v. Dearborn, State v. Jones, State v. Littlejohn, State v. McGuire, State v. Sveum, State v. Allen, State v. Henley, Krier v. Vilione.

should have recused herself.<sup>4</sup>

Second, circumstances have changed, especially campaign funding and campaign speech, increasing the likelihood of motions for recusal based on campaign financing and speech.

According to the Brennan Center for Justice, judicial campaigns have raised and spent significantly more money between 2000 and 2009 than between 1990 and 1999 and spending by persons and entities independently of the candidate's campaign has significantly increased.

The United States Supreme Court has recently overturned a West Virginia supreme court decision. The United States Supreme Court held that a state justice violated a litigant's due process by sitting on a case when the justice directly or indirectly received massive campaign contributions from a person closely related to that case.

Provisions in Codes of Judicial Conduct that have been viewed as limitations on a judge's campaign speech have been struck down as violations of the First Amendment, apparently allowing judges to speak more freely on a number of issues.

The staff memos submitted to you demonstrate that courts and legislatures around the country (and the American Bar Association) have been moved by these circumstances to grapple with the subject of recusal.

Let me begin by summarizing the three distinct bodies of law governing the grounds for recusal and the procedure for determining whether a judge is disqualified under each

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<sup>4</sup>State v. Henley, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853.

body of law. I will also point out that the consequences of a judge improperly sitting on a case may differ depending on which body of law the judge has violated and which procedure is used. My presentation can be diagrammed as follows:

<b>Laws Governing Recusal</b>		
<b>Due Process</b>	<b>§ 757.19</b>	<b>Code of Judicial Conduct</b>
1. Grounds	1. Grounds	1. Grounds
2. Procedure to determine recusal	2. Procedure to determine recusal	2. Procedure to determine recusal
3. Consequences of judge failing to recuse	3. Consequences of judge failing to recuse	3. Consequences of judge failing to recuse

Three different bodies of law regulate recusal: (1) the federal and state constitutional guarantees of due process; (2) the Wisconsin statutes; and (3) the Code of Judicial Conduct.

**(1) Due Process.** The due process standard for requiring recusal was recently set forth by the United States Supreme Court in Caperton v. A.T. Massey Coal Co, Inc., 129 S. Ct. 2252 (2009). Caperton involved a West Virginia justice who refused to step down from a case in which an individual closely aligned with one of the parties in a pending case had expended substantial funds to elect the justice. The United States Supreme Court concluded that the justice's sitting on the case violated due process. The West Virginia Supreme Court had to redo the case.

The due process standard set forth in Caperton is an objective one: Recusal is required as a matter of due process when "the probability of actual bias on the part of

the judge or decision make it too high to be constitutionally tolerable." Caperton, 129 S. Ct. at 2257 (citing Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456 (1975)). The objective test for recusal does not require actual bias.

The procedure for recusal is that the challenged judge determines whether to recuse himself or herself. If the judge refuses to recuse himself or herself, the question then arises whether the judge's decision to sit is reviewable or the litigant's rights cease when the judge decides to sit.

Members of our court seem to disagree whether the challenged justice's decision is final or whether our court can review the merits of a justice's decision to sit on a case when the challenge is based on due process grounds. This disagreement may extend to our Court's reviewing the decision of a circuit court or court of appeals judge to sit on a case when challenged on due process grounds. Those justices who conclude that the court has no power to review a challenged justice's or judge's decision to sit on a case rely on the federal courts to review the due process question of a justice's or judge's decision to sit on the case.

If a judge's or justice's participation in the case violates due process, the judgment is void and is a do over. Caperton, 129 S. Ct. at 2267.

(2) **Sec. 757.19, Wis. Stat.** The legislature's list of mandatory grounds for recusal is set forth in § 757.19, which is the legislature's attempt to safeguard the right to a fair and impartial justice. The statute dates back to 1849, the wording being recreated in 1977 to read substantially as it does today. R.S. 1849, c.87, § 20.<sup>5</sup>

Justice Crooks, in his letter to the Legislative Council and in his appearance today, has pointed out a significant weakness with § 757.19. The statute does not provide for recusal when the judge's impartiality may reasonably be questioned. In other words, the statute does not require disqualification when the facts might reasonably cause an objective observer to question a judge's impartiality.

I join Justice Crooks in calling your attention to the need to amend § 757.19 to provide, as the federal statute and the Code of Judicial Conduct do, an objective test, that is, that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. 21 § 455(a)<sup>6</sup>; SCR 60.04(1)(a) & (4).<sup>7</sup> The United States Supreme Court wrote in Caperton, 129 S. Ct. at 2266, that a state may choose standards more rigorous than due

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<sup>5</sup> The statute provides that if a judge fails to follow the statute, the violation may be reported to the Judicial Commission.

<sup>6</sup> See Memo No. 5 at p. 1.

<sup>7</sup> The Code defines "impartiality" to mean "the absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." SCR 60.01(7m).

process for recusal. The Wisconsin legislature should do so.

The procedure for recusal under the statute appears to be the same as for recusal under due process. The challenged judge determines whether to recuse himself or herself. If the judge refuses to recuse himself or herself, the question then arises whether the challenged judge's decision is final or whether the judge's decision to sit is reviewable. Members of our court appear to disagree whether our court has the power to review the merits of a justice's decision to sit on a case when the challenge is based on statutory grounds. This disagreement may extend to our Court's power to review the decision of a circuit court or court of appeals judge to sit on a case when challenged on statutory grounds.

If a judge or justice participates in a case in violation of the statute, Wisconsin case law indicates that the judgment is void and is a do over.<sup>8</sup>

**Code of Judicial Conduct.** The Code of Judicial Conduct provides the circumstances under which there is a violation of the Code if a judge fails to recuse himself or herself. See SCR 60.04(4) provides that a judge (and justice) shall recuse himself or herself "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

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<sup>8</sup> American TV, 151 Wis. 2d at 180-81, 443 N.W.2d 662.

question the judge's ability to be impartial." This is an objective standard that Justice Crooks proposes be added to § 757.19.

I turn now to the procedures to enforce recusal under the Code. The procedures the legislature created for judicial discipline (which I discussed earlier) apply to a judge's failure to recuse himself or herself as required by the Code. Here is where discipline and recusal overlap. The Wisconsin Constitution provides that "each justice or judge shall be subject to discipline by the supreme court pursuant to procedures established by the legislature by law." Thus the members of the Supreme Court have not challenged the power of the Court to impose discipline on a judge and a justice for violating the Code, including suspension or removal of the judge for cause.

A violation of the Code's recusal provisions is a ground for judicial discipline, but discipline for a violation of the Code does not necessarily affect the validity of the judgment in which the challenged judge participated.<sup>9</sup> "A judge may be disciplined for conduct that would not have required disqualification under sec. 757.19, Stats."<sup>10</sup> Thus, a finding of an ethical violation does not necessarily furnish relief to a party who has lost a case. Justice Crooks' materials explain this peculiarity, as does the case law.<sup>11</sup>

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<sup>9</sup> American TV, 151 Wis. 2d at 185.

<sup>10</sup> American TV, 151 Wis. 2d at 185.

<sup>11</sup> American TV, 151 Wis. 2d at 185.

Amending § 757.19 to provide an objective standard might operate to give a party a remedy for violation of the Code.

The Court has recently amended the Code of Judicial Conduct to create § 60.04(7) and 60.04(8) providing that a judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding or on the sponsorship of an independent expenditure or issue advocacy communication.

Justice Bradley, Justice Crooks and I dissented from the adoption of the rule. We asked for a study committee to report on this proposal. Justice Bradley has, I believe, filed a copy of the court order along with the opinions. I continue to advocate study of the relationship of campaign funding and recusal.

The Court had agreed to appoint a Commission to review the Wisconsin Code of Judicial Conduct in light of changes in the American Bar Association Model Code (which is the basis of the Wisconsin Code of Judicial Conduct). Our Court had adopted an earlier version of the ABA Model Code with modifications. After refusing to have a study committee on the campaign financing proposal, the Court voted 4-3 that it will not appoint a Commission to study the entire Code.

I favor a Commission to study the Code, including a study of the amendments to the Code adopted in 2010 relating to recusal and campaign contributions. I am disappointed that my colleagues on the Supreme Court do not come back to the table to reconsider amending the Code of Judicial Conduct in light of the revisions of the American Bar Association Model Code and to give additional guidance on campaign funding that might merit recusal.

This Legislative Council Committee might consider urging the Court to appoint such a Commission to study revision of the Code. The Court is always receptive to suggestions from the legislative branch.

The time has come to beef up the safeguards that keep our justice system secure. Let the people have confidence that the judges deciding their cases are fair, neutral, impartial and non-partisan; that judgments rendered by judges who are disqualified under the federal or state constitution or the statutes will be declared void; and that discipline will be imposed for violations of the Code of Judicial Conduct.

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The late Chief Justice William H. Rehnquist, who was a Wisconsin native, liked to speak about what sets our nation apart. Above all else, the Chief Justice said, was an original idea put forth by the framers of the United States Constitution, the idea of an independent, fair, neutral, and

impartial judiciary which Rehnquist called "one of the crown jewels of our system of government today."

The people of Wisconsin look to both the Court and the Legislature to safeguard that crown jewel. The people must be assured that the courts work for them and them alone. The courts do not work for special interests, associations, advocacy groups or political parties of any kind, pro- or anti-anything. We work for the 5.6 million people who call this great state home. They are the "all" in "Justice for All."

Thank you for having me and thank you for your attention to the issue.