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DEPARTMENT OF JUSTICE

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February 5, 2013

The Honorable Shirley S. Abrahamson
Chief Justice, Wisconsin Supreme Court
Post Office Box 1688
Madison, WI 53701-1688

Re: Rules Petition #12-11 (*In re Matter of the Creation of a Judicial Code Review Committee*)

Dear Chief Justice Abrahamson:

I write with respect to the above Rules Petition, which calls for the creation of a Committee to review the Wisconsin Code of Judicial Conduct, Supreme Court Rule Chapter 60. The current iteration of the Petition proposes a 24-member Committee, comprised of representatives or designees from various government agencies and non-government organizations.

Should the Court choose to create such a Committee, the Department of Justice respectfully requests that it be included among the agencies and organizations represented on the Committee. As you know, the Department's attorneys routinely appear on behalf of the State and its agencies in circuit courts, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court. The Department has a keen interest in the process of establishing appropriate standards for judicial conduct and has previously submitted comments on these matters[1]. When the Court next considers Rules Petition #12-11, I ask that you propose an amendment that would authorize the Wisconsin Attorney General to select a lawyer member to serve on the Committee.

[1] *See, e.g.*, Letter from Raymond P. Taffora, Deputy Attorney General, to David R. Schanker, Clerk of the Supreme Court, "Re: Department of Justice Comments on Supreme Court Rule Petition 08-16" (October 27, 2009).

I thank you for your consideration in this matter.

Sincerely,

Kevin M. St. John
Deputy Attorney General

KMS: pss
Enclosure

cc: The Honorable Ann Walsh Bradley
The Honorable Neil Patrick Crooks
The Honorable Michael J. Gableman
The Honorable David T. Prosser
The Honorable Patience D. Roggensack
The Honorable Annette K. Ziegler
Kevin C. Potter, Administrator, DOJ Division of Legal Services
Greg M. Weber, Assistant Attorney General

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October 27, 2009

Mr. David R. Schanker, Clerk
Wisconsin Supreme Court
Attention: Carrie Janto, Deputy Clerk
Post Office Box 1688
Madison, WI 53701-1688

Re: Department of Justice Comments on Supreme Court Rule Petition 08-16

Dear Mr. Schanker:

On behalf of the Wisconsin Department of Justice, I am providing comments on Supreme Court Rule Petition 08-16, which proposes standards for judicial recusal.

Central to our position on Petition 08-16 is the recognition that, through its Constitution, Wisconsin has made a public policy determination that judges should be elected by the people they will serve. To give content to that policy, recusal should be limited to those rare instances where a judge is unable to be impartial or where reasonable, well-informed persons knowledgeable about judicial ethics and the facts and circumstances the judge knows or should know would reasonably question the judge's ability to be impartial. Likewise, we recognize that the State and Federal Constitutions protect the rights of free speech and free association – rights that include the right to use one's resources to support candidates for office, including judicial candidates.

In our view, Petition 08-16 contravenes these important principles and should not be adopted.

First, the practical effect of the rule proposed by Petition 08-16 is to create a limit on campaign contributions for persons who may appear in court. Under the proposal, a judge who while a candidate for judicial office received contributions that exceed the amounts proposed by Petition 08-16 but still within the maximum contribution limitations established by law would have to recuse himself or herself. Importantly, the receipt of lawful campaign contributions has not been seen as requiring mandatory recusal under the current SCR 60.04(4). Thus, the proposal seeks to deprive individuals the right to be heard by an elected judge in cases where the judge has not been shown to be biased, where reasonably well-informed persons can not raise reasonable questions as to the judge's ability to be impartial, and where the legislature's limitations on judicial campaign contributions have been followed.

To avoid the proposal's mandatory recusal, a judicial candidate wishing to hear all cases as a judge that meet the current rule's standards may reject contributions which exceed the stated limits in Petition 08-16.[1] This would, however, disadvantage a judicial campaign that chooses such a course and effectively deny a citizen his or her right to speak through lawful campaign contributions.

The limits in Supreme Court Rule Petition 08-16 do not appear to be based on any specific factual findings and are not, in anyway way, tied to either (a) the demonstration of actual bias or reasonable questions of bias under the standard in current SCR 60.04(4); (b) the extreme type of fact scenario presented in *Caperton v. Massey*, 556 U.S. ___, 129 S.Ct. 2252 (2009); or (c) a significant risk of actual due process violations.

We do not believe that either bias or reasonable questions raised by well-informed persons knowledgeable of judicial ethics standards as to a judge's ability to be impartial are established by every lawful campaign contribution within the limits proscribed by Wisconsin law. Consequently, it is our position that any measure that effectively changes the amount that can lawfully be contributed to a candidate for judicial office, if advisable at all, should be accomplished through legislation, not through judicial rule that creates a *de facto* change to election laws.

Second, the rigid recusal standards in Petition 08-16 create a framework for manipulation. For example, assume that Party A believes that a candidate for the Supreme Court is likely to decide against that party in a pending matter. It may be far more cost effective for Party A to financially support the disfavored candidate to force recusal than to provide support for that candidate's opponent. Such manipulation should not be encouraged.

Third, the proposed rule seems to assume that receipt of contributions will lead to a lack of partiality. However, this assumption reflects a misunderstanding of what impartiality means in a judicial context. If someone is seeking judicial office they will, hopefully, have significant experience, possess a high level of intelligence and be an active participant in the legal community. Such persons will rarely, if ever, come to the bench without any preconceptions or leanings on legal issues and judicial philosophy. However, that does not mean that the candidate, as an elected judge, will be partial or biased. As discussed in *Republican Party of Minnesota v. White*, 536 U.S. 765, 777-778 (2002), "impartiality," properly understood, means "not that [a judge] have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case." *Id.* In fact, it is likely that conscientious judges who do have preconceptions will be particularly diligent in recognizing them and will make sure that they remain open to opposing views.

Fourth, existing rules are adequate to prevent a *Caperton*-type situation from arising. Most significantly, there is simply no evidence to suggest that judicial bias has been a problem in

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[1] While direct contributions can be rejected, Petition 08-16 appears to encompass third-party expenditures that the judicial candidate does not "accept" and thus cannot reject.

Wisconsin courts. While disappointed litigants may naturally tend to question a judge's commitment to fairness and the rule of law, the proponents of Petition 08-16 have not shown that our courts have failed to provide a fair process consistent with due process. Moreover, the Code of Judicial Conduct squarely addresses concerns about bias and partiality in numerous rules. *See e.g.*, SCR 60.02(1) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); 60.02(2) ("A judge may not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment"); 60:04(1)(b) ("A judge shall be faithful to the law and maintain professional competence in it. A judge may not be swayed by partisan interests, public clamor or fear of criticism."); 60:04(1)(e) ("A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and others subject to the judge's direction and control to do so."); 60:05(1)(a) ("A judge shall conduct all of the judge's extra–judicial activities so that they do none of the following:...Cast reasonable doubt on the judge's capacity to act impartially as a judge.").

Finally, while perceptions can be important, it is important to remember that not all perceptions are accurate and that attempts to address those perceptions can have adverse consequences. By focusing on perception, the proposed rule puts too much emphasis on what some people might think and not enough emphasis on the integrity of judges and the right of the people to participate in judicial elections. When a fair-minded, unbiased judge is forced to recuse himself or herself, the public loses and the people who elected the judge are effectively disenfranchised. An unintended risk of the rule proposed in Petition 08-16 is that judges will not only be forced to recuse themselves from matters required under the rule, but will be more likely to recuse themselves in other matters as well. When actual bias or a reasonable question of bias does not exist, and there is not an extreme factual situation such as the one addressed in *Caperton*, the public's expectation that a public official will perform the duties that official is elected to do is compromised.

Sincerely,

Raymond P. Taffora

Raymond P. Taffora
Deputy Attorney General

RPT/KMS: pss