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VIA EXPRESS MAIL

Wisconsin Supreme Court
P.O. Box 1688
Madison, WI 53701-1688

RE: Petition 08-16 (recusal - LWV)
Petition 08-25 (recusal - WRA)
Petition 09-10 (recusal - WMC)

Dear Honorable Justices:

I provide the following comments to the various petitions currently pending before this Court to amend the Code of Judicial Conduct provisions dealing with recusal for bias. I understand that those petitions are scheduled for hearing on October 28, 2009.

I provide these comments out of a deep-seated concern that recusal reform is critical to protect the very legitimacy of this Court. I am firmly convinced that the Supreme Court was correct in noting that

> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.

United States v. Mistretta, 488 U.S. 361, 407 (1989).

The petitions currently before the Court, however, will either undermine the integrity and public perception of the Court as a fair and impartial arbiter of disputes, in the case of the WMC's and WRA's proposed exceptions to the current bias rules, or go too far in requiring recusal when there is no realistic probability of bias, in the case of the LWV's petition.

As the Court is aware, I have practiced before it for more than 22 years. As the Court also is aware, I have dedicated my practice to insuring the integrity and fairness of Wisconsin's court system, not only through my representation of those accused of crimes, but also through my assistance to the Judicial Council in researching and presenting improvements to the appellate rules, my service as co-chair of the Appellate Practice Section's Pro Bono Committee, my acceptance of pro bono appointments before this Court, and my assisting the Court with amicus briefs in a number of cases,

nearly all again on a pro bono basis.

In these comments, I first provide a summary regarding the three sources of law controlling the question of recusal for bias in Wisconsin. This reminder appears necessary because many of the comments previously submitted reflect some confusion regarding the fact that it is only the rules in the Code of Judicial Conduct that are before the Court. I then briefly address my specific concerns regarding each of te proposals currently before the Court.

I. Recusal for Bias in Wisconsin

Different standards and procedures for recusal (sometimes called disqualification) in Wisconsin are governed by court rule, by statute, and by the constitutional right to due process. Although there exist other grounds for recusal, the following discussion focuses on recusal based on the actual or apparent bias of the judge for or against one party to the litigation.

A. Code of Judicial Conduct

As relevant here, the Code of Judicial Conduct provides:

> Except as provided in sub. (6) for waiver, a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following or *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*:
>
> > (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

SCR 60:04(4) (emphasis added).

SCR 60:04(4) thus establishes both a subjective standard (whether the judge has a personal bias concerning a party or party's lawyer) and an objective standard (whether "well-informed persons . . . would reasonably question the judge's ability to be impartial"). *See State v. Asfoor*, 75 Wis.2d 411, 436, 249 N.W.2d 529 (1977) ("[t]he judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably

be questioned.") Violation of the Code of Judicial Ethics, although subjecting the offending judge to discipline, "has no effect on their legal qualification or disqualification to act." *State v. American TV & Appliance of Madison, Inc.*, 151 Wis.2d 175, 185, 443 N.W.2d 662 (1989)

B. Wis. Stat. §757.19(2)

Wisconsin Statute §757.19(2) provides a similar but not co-extensive standard:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> * * *
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

"[T]he determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make" under that statute. *American TV*, 151 Wis.2d at 183.

C. Due Process

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see State v. Carprue*, 2004 WI 111, ¶59, 274 Wis.2d 656, 683 N.W.2d 31. "A neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). *See also Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process"). Due process thus "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process." *Marris v. City of Cedarburg*, 176 Wis.2d 14, 25-26, 498 N.W.2d 842 (1993).

Moreover, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Thus, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). *See also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker

constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness"); *Murchison*, 349 U.S. at 136 (holding that "to perform its high function in the best way justice must satisfy the appearance of justice" (internal quotation marks omitted)); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) ("even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias"). The "inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance . . . .'" *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (citation omitted).

Of course, the due process requirement to avoid even the appearance of bias is critical, not merely to ensure that the particular litigants are assured of a fair hearing, but to the legitimacy of the Court's judgments as well. "The power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for the judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). In other words, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *United States v. Mistretta*, 488 U.S. 361, 407 (1989).

The United States Supreme Court's recent decision in *Caperton v. A. T. Massey Co., Inc.*, 129 S.Ct. 2252 (2009), reaffirms the principle that due process is violated, not only where the judge is actually or subjectively biased in favor of one party to litigation or against another, but also where there exists an impermissible likelihood or reasonable appearance of such bias. The Supreme Court there held that due process required recusal of a judge where, even in the absence of actual prejudice or bias, the circumstances created "a serious risk of actual bias-based on objective and reasonable perceptions." *Id.* at 2263.

> The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 2262.

II. WRA's and WMC's Proposed Exceptions to the Current Rule Requiring Recusal for Actual Bias or the Appearance of Bias

Although not acknowledged as such by their authors, the proposals of Wisconsin Manufacturers and Commerce and the Wisconsin Realtors' Association seek to create

exceptions to SCR 60:04(4) that currently provides that

> 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

The proposals by WRA and WMC seek to erect exceptions to the requirement of recusal under this provision when the actual bias or reasonable appearance of bias arises from either contributions to the judge's campaign or independent expenditures supporting that judge's election. Because recusal for bias is not required in any event in the absence of either actual bias or the reasonable appearance of bias, these proposed exceptions can have no effect *except* where there already exist grounds for recusal, and thus reasonable grounds for questioning the judge's impartiality. Those proposals, in other words, seek to weaken rather than strengthen the requirement of recusal, allowing the judge to avoid censure under the Judicial Code of Conduct despite having denied recusal, even when the contributions or independent expenditures create either actual bias or the reasonable appearance of bias.

With all due respect, enacting such an exception and allowing a judge to remain on a case despite actual bias or a reasonable appearance of bias will do grave damage to the reputation for impartiality and nonpartisanship on which this Court's legitimacy is based.

I also note that, even if this Court should adopt the misguided and self-serving proposals of WMC and WRA, it would not alter the judge's obligation of recusal in the circumstances covered by those suggested exceptions. Once again, the proposed amendments address only the judge's ethical obligations under the Code of Judicial Ethics. The parallel requirements of Wis. Stat. §757.19(2), mandating disqualification whenever the judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner," would remain, requiring the judge's recusal even where the WMC and WRA exceptions may provide immunity from ethics charges. The due process requirement of recusal reaffirmed in *Caperton* likewise remains where there exists an impermissible likelihood or reasonable appearance of such bias. The proposed exceptions accordingly would create unnecessary confusion by suggesting exceptions to the requirement of recusal where they in fact do not exist, as well as undermine the Court's reputation and authority as a neutral arbiter of legal disputes.

The purported rationale for the WMC's proposed exception is that, to require recusal where either actual bias for a party or the reasonable appearance or likelihood of such bias arises due to its independent expenditures in support of the judge's election, would somehow "chill" or violate the First Amendment rights of the party benefitting from that actual or apparent bias. *See* WMC's Memorandum of Law in Support of its Rule Petition at 10-26. However, subsequent recusal for bias in no way interferes with the speech of either a judicial candidate or his or her supporters. Neither the judge nor the supporters are prevented from speaking their minds; the judge is merely prevented from later presiding where the circumstances undermine the impartiality required of someone acting as a judge. Those who invest in judicial campaigns, in other words, have no First Amendment right to a return on their investment. *See Caperton*, 129 S.Ct. at 2265 ("Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties - a man chooses the judge in his own cause").

Even if requiring recusal for actual or apparent bias somehow impinged on the First Amendment rights of the beneficiary of that bias, the Supreme Court made clear in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-76 (2002), that preserving the impartiality of the Court, in the sense of neutrality as between parties to litigation, is a valid basis on which to restrict otherwise protected speech. *See also Caperton*, 129 S.Ct. at 2266-67 (because "'[j]udicial integrity is . . . a state interest of the highest order,' States may choose to 'adopt recusal standards more rigorous than due process requires.'" (quoting *White*, 536 U.S. at 793-94 (Kennedy, J., concurring)). The exercise of one's First Amendment rights, moreover, does not immunize one from the necessary consequences of that exercise. *E.g.*, *Siefert v. Alexander*, 597 F.Supp.2d 860, 882 (W.D. Wis. 2009) (availability of strong recusal standards is sufficient alternative to restricting speech of judicial candidate that may evidence partiality or bias).

The proposals of WMC and WRA to create new exceptions to the rules requiring recusal for either actual bias or the reasonable appearance of bias thus are wholly unjustified.

III. The League of Women Voters' Proposal to Add an Additional Basis for Recusal

The League of Women Voters' petition would require recusal where a party or lawyer in a proceeding previously made a campaign contribution greater than a specified amount to, or undertook a media campaign relating to, a judicial election for a judge presiding over the case.

The League certainly is to be commended for its attempts to protect the integrity of this Court. Moreover, given that the Supreme Court has squarely rejected WMC's suggestion that the First Amendment bans any recusal standard more restrictive than the due process standard reaffirmed in *Caperton*, 129 S.Ct. at 2266-67; *White*, 536 U.S. at 775-76, the League's proposal is not rationally objectionable on those grounds.

Still, the League's proposal appears to go too far by requiring recusal under circumstances when there is no reasonable probability of bias. The League's standards for recusal ($1,000 contribution, any mass media advertisement, or 50 calls, e-mails, or postcards) may be sufficient to justify concerns for bias in a circuit court race, given the smaller amounts of overall campaign spending in such races. However, they would not generally justify such concerns in Court of Appeals or Supreme Court races, which cover a much larger area of the state and involve a much greater expenditure of funds.

Perhaps a more effective standard for achieving the same goal while not requiring recusal in the absence of some valid concern for bias would be to set the trigger requiring recusal, not on the dollar amount of the contribution or independent expenditure, but on the percentage of the judge's total campaign contributions represented by the contribution or independent expenditure made by the party or lawyer for a party. A percentage trigger also would reduce the need to revisit the rule in light of changed circumstances.

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I appreciate the opportunity to provide my views on this important topic.

Sincerely,

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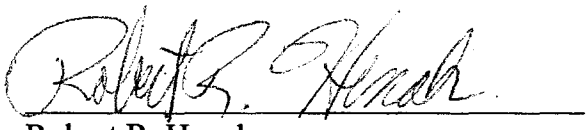

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Comment to Rules Petitions 10-23-09.wpd