

ISSUE I

Is a judge required to recuse himself or herself from contested matters in which a party is represented by an attorney who was previously a member of a fraternal organization of which the judge was also a member and who, as a president of that local organization, signed the judge's daughter's application for a scholarship to an affiliated national organization, thereby verifying the legitimacy of the application?

ANSWER

No.

ISSUE II

Is a judge required to recuse himself or herself from contested matters in which a party is represented by an attorney whom the judge has appointed as a supplemental court commissioner under WIS. STAT. § 757.675?

ANSWER

No. By itself, the fact that the attorney appearing before a judge has been appointed as a supplemental court commissioner by the judge does not require recusal. However, some supplemental court commissioner appointments may involve circumstances that do require recusal.

FACTS

Facts relating to Issue I: The judge and an attorney were both members of a local fraternal organization during some unspecified period of time in the past. During this time period, and while the attorney was the president of the local organization, the judge's daughter applied for a scholarship from an affiliated national organization. As president of the local organization, the attorney signed the judge's daughter's application, a requirement that provides verification to the national organization that the application is "legitimate." The judge's daughter subsequently was awarded \$1,000 by the national organization. The attorney is no longer a member of the local organization, although he remains a member of the national organization. Occasionally, the attorney appears in the judge's court.

Facts relating to Issue II: The judge has appointed two attorneys as supplemental court commissioners under the authority granted in WIS. STAT. § 757.675. Pursuant to the statute, the judge may discharge these attorneys as supplemental court commissioners "at will and without cause." WIS. STAT. § 757.675(1). The authority of

supplemental court commissioners is limited and is specified in § 757.675(2)-(5). Under these provisions, a supplemental court commissioner may assist the judge in performing various duties, but no such relationship exists between the requesting judge and his supplemental court commissioners here. Occasionally, one of these attorneys appears in the judge's court.

DISCUSSION

The requesting judge correctly recognizes that the governing code provision is SCR 60.04(4), but the phrasing of the judge's questions (including whether *disclosure* is required) suggest some confusion regarding SCR 60.04(4) and its interaction with the waiver provision, SCR 60.04(6). Accordingly, we begin with a brief description of these two code provisions and then proceed to answer the two pertinent questions as we have reframed them.

SCR 60.04(4) defines circumstances in which a judge must recuse. It contains a list of particular circumstances which require recusal and, pertinent here, more generally provides:

[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

If recusal is required under SCR 60.04(4), the judge must either recuse or obtain a waiver of recusal under the procedure set forth in SCR 60.04(6). It is this waiver provision that addresses disclosure; under it a judge "may disclose" if the judge chooses to give the parties an opportunity to waive recusal. Specifically, SCR 60.04(6) provides:

A judge required to recuse himself or herself under sub. (4) may disclose on the record the basis of the judge's recusal and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive recusal. If, following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be required to recuse himself or herself and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Thus, a judge is never required to disclose circumstances that may require recusal. Rather, disclosure is an option for a judge who has determined that he or she must recuse, absent a waiver, and who chooses to inquire about a waiver under SCR 60.04(6). It follows that a question framed in terms of whether a judge must *disclose* misses the mark.

Accordingly, we interpret the gist of the judge’s inquiry here to be whether recusal is required under either of the fact situations presented. As to each circumstance, that question is dispositive. If the judge is not required to recuse, the judge need not disclose. If the judge is required to recuse, the judge likewise need not disclose, but may choose to do so under the waiver procedure in SCR 60.04(6).

Before moving on, we observe that a comment to SCR 60.04(4) states that “[a] judge should disclose ... information that ... the parties or their lawyers might consider relevant to the question of recusal, even if the judge believes there is no real basis for recusal.” This comment is a recommendation, not a requirement. We confine this opinion to answering the questions asked in light of judicial conduct code *requirements*.

Issue I: Is a judge required to recuse himself or herself from contested matters in which a party is represented by an attorney who was previously a member of a fraternal organization of which the judge was also a member and who, as a president of that local organization, signed the judge’s daughter’s application for a scholarship to an affiliated national organization, thereby verifying the legitimacy of the application? We answer this question no for the following reasons.

Whether recusal is required under SCR 60.04(4) is determined by reference to a “well-informed persons” standard. The question is not whether a reasonable member of the public would question the judge’s impartiality. Rather, the question is whether “reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system ... would reasonably question the judge’s ability to be impartial.”¹ We conclude that “well-informed persons” under this standard would not reasonably question the judge’s ability to be impartial in the circumstances presented.

The fact that the attorney signed something verifying that the judge’s daughter’s application was legitimate does not show that the attorney assisted in obtaining the scholarship money in any way that suggests a reason to question the judge’s impartiality. Rather, as described, it appears the attorney did what any president of this organization would do for any member—he simply and with little effort signed the application, thereby verifying that the daughter was qualified by virtue of a qualifying affiliation with the organization.

¹ In a 2003 advisory opinion, Opinion 03-1, we also addressed recusal questions. There, as here, we relied on the “well-informed persons” standard in SCR 60.04(4). Unfortunately, we also looked to SCR 60.03(1), which, we explained, “sets the standards for dealing with the *public’s perception* of the integrity and impartiality of the judiciary.” Opinion 03-1 at 2 (emphasis added). Our reliance on SCR 60.03(1) was misplaced because that provision is a general provision requiring judges to avoid improprieties and the appearance of improprieties, whereas the specific topic of recusals is governed by SCR 60.04(4) and the narrower “well-informed persons” standard in that provision. Thus, for example, we erred when we advised judges that they must take into consideration “the appearance to the general public” when determining whether they must recuse. Opinion 03-1 at 3.

We emphasize that we stand by our conclusions in Opinion 03-1 regarding a judge’s need to recuse in matters involving a former campaign manager and former campaign opponents and supporters. We have now concluded, however, that we should not have relied on SCR 60.03(1) in answering the judge’s recusal questions.

What remains is the fact that the judge and attorney, during some prior unspecified time period, were both members of a fraternal organization. By itself, this fact would not lead “well-informed persons” to reasonably doubt the judge’s ability to be impartial. Obviously, two persons can be members of the same organization without having a close personal relationship. Furthermore, a person “knowledgeable about ... the justice system” would know that judges routinely and impartially preside over cases involving persons with whom the judge has a connection through common membership in an organization. A common example of this is a judge and attorney who both belong to a county bar association.

Issue II: Is a judge required to recuse himself or herself from contested matters in which a party is represented by an attorney whom the judge has appointed as a supplemental court commissioner under WIS. STAT. § 757.675? We answer this question no, with qualifications.

Again, we are asked whether recusal is required under the “well-informed persons” standard. A well-informed person “knowledgeable about ... the justice system” would know the following: that judges appoint supplemental court commissioners under the authority granted in WIS. STAT. § 757.675; that a judge appoints a supplemental court commissioner subject to the approval of a majority of judges in the judge’s county and may discharge such commissioners at will and without cause; that the statute lists several powers that may be exercised by supplemental court commissioners, such as officiating at weddings, issuing subpoenas to compel the attendance of witnesses, issuing various writs, and conducting hearings addressing specified debtor matters; that judges use a standard form to appoint supplemental court commissioners and on this form the judges specify the particular statutory powers granted the individual commissioner; that most supplemental court commissioners do not use statutory powers to assist the appointing judge; that some supplemental court commissioners obtain income from the exercise of some statutory powers, most notably the power to officiate at weddings under § 757.675(2)(a) and the power to conduct supplemental debtor hearings under § 757.675(2)(h); that appointing judges do not benefit from and do not typically monitor any income-earning activities of their supplemental court commissioners; that judges often appoint supplemental court commissioners who are not close personal friends; and that most supplemental court commissioners derive no substantial benefit from the appointment.

It follows that the fact that an attorney appearing before a judge is one of the judge’s supplemental court commissioners would not, by itself, cause “well-informed persons” to reasonably question the judge’s ability to be impartial. If, however, the judge’s appointment involves a more significant relationship than is suggested by the typical factors we list above, recusal may be required.

It bears repeating that we address only whether recusal is *required* under the limited facts presented in the question before us. We do not, and as a practical matter could not, meaningfully address the variety of situations in which additional factors

would lead to the conclusion that a supplemental court commissioner appointment requires recusal.

CONCLUSION

The Committee concludes that a judge is not required to recuse himself or herself from a contested matter in which a party is represented by an attorney who was previously a member of a fraternal organization of which the judge was also a member and who, as a president of that local organization, signed the judge's daughter's application for a scholarship to an affiliated national organization, thereby verifying the legitimacy of the application. We further conclude that a judge is not required to recuse himself or herself from a contested matter in which a party is represented by an attorney whom the judge has appointed as a supplemental court commissioner because such an appointment, by itself, would not cause "well-informed persons" to reasonably question the judge's ability to be impartial.

APPLICABILITY

This opinion is advisory only. It is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to questions arising under the Supreme Court Rules, Chapter 60, Code of Judicial Conduct. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, Subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 08-2 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 30th day of December, 2008.

/s/ George S. Curry

Honorable George S. Curry
Chair