

STATE OF WISCONSIN
SUPREME COURT

**In the Matter of Amending
the Code of Judicial Conduct**

Petition for Rule Change

To: Justices of the Wisconsin Supreme Court

Retired Supreme Court Justice William A. Bablitch, in his individual capacity, hereby petitions this court to amend the rules related to judicial recusal as set forth herein and to consider this proposal at its public administrative conference on Wednesday, October 28, 2009.¹

These changes are needed to protect the integrity of the justice system in Wisconsin. See also Caperton v. Massey, 129 S. Ct. 2252 (2009).

Presently, Wis. Stat. § 757.19 (2)² (Disqualification

¹ Rules petitions 08-16, 08-25 and 09-10 are scheduled for consideration at the Court's public hearing and administrative conference on Wednesday, October 28, 2009. Rule petition 09-10 was filed with the court on October 16, 2009. In the alternative I request this proposal be considered as a statement of an interested person pursuant to this court's input request letter dated August 7, 2009.

² Currently, Wis. Stat. § 757.19 (2) (Disqualification of judge) provides:

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

(d) When a judge prepared as counsel any legal instrument

of judge) does not address the issue of contributions to a judge's campaign committee.

I recommend the court adopt a provision that will require automatic recusal from a case when the judge's campaign committee has received donations of \$10,000 or more from a party or a party's lawyer.

Recusal should also be required when a judge's campaign committee has received contributions of \$10,000 or more from a person or entity having a direct or indirect interest in the outcome of the case.

Recusal should also be required when contributions are made by a third-party or entity where the contributions are intended to favorably influence the judge's election.

To accomplish these objectives, I recommend the court create two new provisions to 757.19 (2):

(h) When a judge or the judge's campaign committee or a candidate for judicial office or a committee representing the judge's election interests has received donations or cumulative donations in money and/or in-kind in excess of \$10,000 or more from a party or a relative of the party or a party's lawyer, including partners or associates of the lawyer; or has received donations in excess of \$10,000 or more in money and/or in-kind contributions from a person or entity having a direct or indirect interest in the outcome of the case, including but not limited to a business organization, professional organization, or a group joined together for purposes of election activity. This section does not apply if the donations are returned prior to the general election. This section applies whether such expenditures or activities were done with or without the

or paper whose validity or construction is at issue.

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(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.

knowledge or approval of the judge.

(i) When expenditures or in-kind expenditures in excess of \$10,000 or more made by a person or entity having a direct or indirect interest in the outcome of the case were made outside the judge's campaign but intended to favorably influence the judge's election. This section applies whether such expenditures or activities were done with or without the knowledge or approval of the judge.

The dollar amounts proposed here are arbitrary and subject to the best judgment of this court.

The proposed phrase, "direct or indirect interest in the outcome of the case," is somewhat problematic. This may well have to be developed on a case-by-case basis.

In addition, I recommend the court adopt a provision that will provide a litigant with recourse in the event a judge does not recuse himself or herself from a case despite having received contributions in excess of \$10,000 or more; or where expenditures in excess of \$10,000 or more have been spent by a third party or entity to favorably influence the outcome of the judge's election.

This will permit a party to challenge the judge for failing to recuse. The party must show that the judge has received donations in excess of the above referenced limits from third parties or entities, or that expenditures were made by a third-party or entity outside the judge's campaign committee designed to favorably influence the outcome of the judge's election. Upon such showing, the third-party or entity must reveal the source of the funds used for the expenditures. A challenge to a judge's failure to disqualify may be made only by a party and failure by the third-party or entity to reveal the sources of the funding shall result in recusal of the judge.

To accomplish this objective, I recommend the court create a new provision in s. 757.19 to provide:

757.19(x) (A) CHALLENGES. A challenge to a judge's failure to disqualify may be made only by a party, and must be made within two weeks following the deadline for filing of the briefs. Failure to challenge within that time results in waiver of any challenge.

(B) When a challenge is made to a judge for failing to disqualify himself or herself under this section, upon a showing that a judge's campaign has received donations from third-parties or entities in excess of the amounts set forth in in (section) above, intended to favorably influence the outcome of the judge's election, or upon showing that expenditures from a third-party or entity intended to favorably influence the judge's election were in excess of \$10,000 or more, the third-party or entity must reveal the source of the funds used for the expenditures. Failure by the third-party or entity to reveal the funding sources shall result in disqualification of the judge.

Enforcement: This proposal will be largely self enforcing. Most assuredly, lawyers will scrutinize the campaign contributions of the judges and bring appropriate challenges to the Judicial Commission when they deem it appropriate.

Respectfully Submitted,

William A. Bablitch

Retired Justice
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