



April 6, 2017

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RE: Rule Petition 17-01, In Re Rule For Recusal When A Party Or Lawyer Has Made A Large Campaign Contribution

Justices of the Supreme Court of Wisconsin:

We submit these comments on behalf of the Wisconsin Bankers Association ("WBA") regarding Rule Petition 17-01 proposing an amendment to SCR Chapter 60 ("Judicial Code"). The Petition proposes to establish an objective standard requiring recusal or disqualification of a judge who has received the benefit of campaign contributions from a party or a lawyer. The WBA is the largest financial trade association in Wisconsin, representing approximately 270 state and nationally chartered banks, savings and loan associations, and savings banks located in communities throughout the State.

The WBA believes that the Judicial Code as currently written adequately addresses the concerns regarding the recusal or disqualification of a judge who has received the benefit of campaign contributions from a party or a lawyer, is constitutionally sound and appropriately permits persons to make lawful contributions in support of the election of a judge or justice consistent with that person's legal rights.

The WBA further believes that the proposed amendment to the Judicial Code is inconsistent with Wisconsin law regarding the rights of persons to make campaign contributions in connection with the election of judges and justices.

The WBA further believes that the Judicial Code as currently written is sufficiently detailed and grants the appropriate judicial discretion to judges and justices regarding recusal based on facts and circumstances of a particular matter. The Judicial Code is an acceptable standard for the recusal of judges and justices, is appropriately deferential to the judiciary and importantly

provides that judges and justices are not required to recuse themselves where the contributions made to their respective campaigns are lawful under Wisconsin law.

The WBA notes that the Legislature has already made the legal decision regarding the lawfulness of specific amounts contributed to judicial candidates and their campaign committees, and those specific amounts are significantly different than the standard amounts requiring recusal or disqualification of a judge or justice set forth in the Petition for proposed amendments to the Judicial Code. It would be confusing to members of the public wishing to make campaign contributions to judicial elections for the Legislature to have defined specific lawful contribution amounts under Section 11.1101, Wisconsin Statutes, on one hand, and for the Supreme Court, on the other hand, to define a completely different set of lawful contribution amounts as set forth in the proposed amendments to the Judicial Code. The WBA supports the Commentary to current SCR 60.04(7) and believes it is correct when it states that the "purpose of this rule is to make clear that the receipt of a lawful campaign contribution by a judicial campaign committee does not, by itself, require the candidate to recuse himself or herself as a judge from a proceeding involving a contributor."

The WBA also questions the constitutionality of the proposed amendments to the Judicial Code given that certain of those contributions to judicial candidates would be lawful under Wisconsin law as discussed above but would nevertheless cause a judge or justice to be recused or disqualified if those contributions exceed the proposed objective standard set forth in the Petition. The proposed amendments to the Judicial Code will create greater uncertainty rather than establish an objective standard understood by all.

The proposed amendment to the Judicial Code is also directly opposite SCR 60.04(7), which section the Petition proposes to repeal. Importantly, SCR 60.04(7) provides that a judge shall not be required to recuse himself or herself solely because the judge's campaign committee receives a lawful campaign contribution, including the campaign contribution from an individual or entity involved in the proceeding. The Commentary to this Section which the Petition proposes to repeal further states that the disqualification of a judge solely because the judge or his or her campaign committee received a lawful contribution would create the impression that receipt of a contribution automatically impairs the judge's integrity. This, according to the Commentary, would have the effect of discouraging "the broadest possible participation in financing campaigns by all citizens of the state through voluntary contributions, see Wis. Stats. §11.001, because it would deprive citizens who lawfully contribute to judicial campaigns, whether individually or through an organization, of access to the judges they helped elect." Such is the case with the WBA, its member banks and their employees and directors which and whom participate in judicial campaigns from time to time by making contributions as permitted under Wisconsin law. The WBA believes this is an important section and helpful Commentary in the Judicial Code and should not be repealed.

The WBA also suggests that the current version of the Judicial Code is sufficiently detailed to require a judge or justice to recuse himself or herself whenever the facts and circumstances raise a reasonable question of the judge's or justice's ability to act impartially. More specifically, SCR 60.04(4) specifically provides that 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 specific factors set forth in SCR 60.04(4) or when reasonable, well-informed persons knowledgeable about judicial ethics standards and the judicial system are aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial. According to the Commentary, this requirement applies regardless of whether any of the specific rules of SCR 60.04(4) apply.

Finally, the WBA is concerned that the Petition creates an ambiguity regarding the applicability of the proposed amendments to a person appearing in a case as an *amicus curiae*. The WBA occasionally appears in cases before the Court of Appeals and the Wisconsin Supreme Court involving matters of interest to its members as an *amicus curiae* and in those cases is not considered a party in the matter. The WBA as an *amicus curiae* does not have the rights of a party, including the right to make an oral argument unless it is given time by one of the parties, and its decision to make lawful campaign contributions to judicial candidates and their campaign committees should not trigger a requirement for a judge or justice to be recused or disqualified solely because of a lawful contribution by a nonparty. In the event these proposed amendments to the Judicial Code are to be further considered by this Court, the WBA encourages this Court in that instance to make it clear that these proposed amendments would not be applicable to lawful campaign contributions made by an *amicus curiae* in a matter.

In conclusion, the Wisconsin Bankers Association encourages the disapproval of the Petition by this Court for the reasons described above.

Respectfully submitted,

Boardman & Clark LLP



John E. Knight

JEK:sh

cc: Rose Oswald Poels, President/CEO
Wisconsin Bankers Association