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Supreme Court of Wisconsin

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December 16, 2014

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*Additional Parties listed on Pages 13-14

You are hereby notified that the Court has entered the following order:

Nos. 2013AP2504-2508-W Three Unnamed Petitioners v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

2014AP296-OA Two Unnamed Petitioners v. Peterson
L.C.#s2012JC23, 2013JD1, 2013JD6, 2013JD9 & 2013JD11

2014AP417-421-W Schmitz v. Peterson
L.C.#s2013JD11, 2013JD9, 2013JD6, 2013JD1 & 2012JD23

Pending before this court are petitions in three separate proceedings relating to John Doe proceedings that have been initiated in five counties: (1) a petition for review seeking review of a court of appeals' order of January 30, 2014 (Case Nos. 2013AP2504-2508-W[1]); (2) multiple

[1] Because John Doe case files had been opened in each of the five counties, five separate writ proceedings with five separate case numbers (Case Nos. 2013AP2504-2508-W) were opened in the court of appeals when the Three Unnamed Petitioners filed a petition for supervisory writ in the court of appeals. For purposes of this order, these five writ proceedings will be referenced as a single writ proceeding. The same holds true for the five writ proceedings with five separate case numbers (Case Nos. 2014AP417-421-W) that were opened in the court of appeals when the Special Prosecutor, Attorney Francis A. Schmitz, filed a subsequent petition for supervisory writ

petitions for bypass of the court of appeals in a supervisory writ proceeding filed in the court of appeals by Special Prosecutor Francis A. Schmitz (Case Nos. 2014AP417-421-W); and (3) a petition for leave to commence an original action filed by Two Unnamed Petitioners (Case No. 2014AP296-OA). Responses to each of these petitions as well as statements of additional authorities also have been filed in this court. In addition to multiple motions by various parties to seal various filings in this court, the Three Unnamed Petitioners in Case Nos. 2013AP2504-2508-W have filed a motion to add five individuals as respondents in this court.

The court having considered all of the foregoing,

IT IS ORDERED that the petition for review in Case Nos. 2013AP2504-2058-W is granted; the petitions to bypass the court of appeals in Case Nos. 2014AP417-421-W are granted and this court assumes jurisdiction over that action; and the petition for leave to commence an original action in Case No. 2014AP296-OA is granted and this court assumes jurisdiction over that action. These three proceedings shall be consolidated for purposes of briefing and oral argument in this court; and

IT IS FURTHER ORDERED that the parties' briefs shall address the following issues:

1. Whether the Director of State Courts had lawful authority to appoint reserve judge, Barbara Kluka, as the John Doe judge to preside over a multi-county John Doe proceeding.

2. Whether the Chief Judge of the First Judicial District had lawful authority to appoint reserve judge, Gregory A. Peterson, as the John Doe judge to preside over a multi-county John Doe proceeding.

3. Whether Wis. Stat. § 968.26 permits a John Doe judge to convene a John Doe proceeding over multiple counties, which is then coordinated by the district attorney of one of the counties.

4. Whether Wisconsin law allows a John Doe judge to appoint a special prosecutor to perform the functions of a district attorney in multiple counties in a John Doe proceeding when (a) the district attorney in each county requests the appointment; (b) but none of the nine grounds for appointing a special prosecutor under Wis. Stat. § 978.045(1r) apply; (c) no charges have yet been issued; (d) the district attorney in each county has not refused to continue the investigation or prosecution of any

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in the court of appeals. For purposes of this order, these five writ proceedings will also be referenced as a single writ proceeding.

potential charge; and (e) no certification that no other prosecutorial unit was able to do the work for which the special prosecutor was sought was made to the Department of Administration.

5. If, arguendo, there was a defect in the appointment of the special prosecutor in the John Doe proceedings at issue in these matters, what effect, if any, would that have on the competency of the special prosecutor to conduct the investigation; or the competency of the John Doe judge to conduct these proceedings? See, e.g., State v. Bollig, 222 Wis. 2d 558, 569-70, 587 N.W.2d 908 (Ct. App. 1998).

6. Whether, with regard to recall elections, Wis. Stat. § 11.26(13m) affects a claim that alleged illegal coordination occurred during the circulation of recall petitions and/or resulting recall elections.

7. Whether the statutory definitions of "contributions," "disbursements," and "political purposes" in Wis. Stat. §§ 11.01(6), (7) and (16) are limited to contributions or expenditures for express advocacy or whether they encompass the conduct of coordination between a candidate or a campaign committee and an independent organization that engages in issue advocacy. If they extend to issue advocacy coordination, what constitutes prohibited "coordination?"

    a. Whether Wis. Stat. § 11.10(4) and § 11.06(4)(d) apply to any activity other than contributions or disbursements that are made for political purposes under Wis. Stat. § 11.01(16) by
        i. The candidate's campaign committee; or
        ii. An independent political committee.

    b. Whether Wis. Stat. § 11.10(4) operates to transform an independent organization engaged in issue advocacy into a "subcommittee" of a candidate's campaign committee if the independent advocacy organization has coordinated its issue advocacy with the candidate or the candidate's campaign committee.

    c. Whether the campaign finance reporting requirements in Wis. Stat. ch. 11 apply to contributions or disbursements that are not made for political purposes, as defined by Wis. Stat. § 11.01(16).

    d. Whether Wisconsin Coalition for Voter Participation, Inc. v. State Elections Bd., 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App), pet. for rev. denied, 231

Wis. 2d 377, 607 N.W.2d 293 (1999), has application to the proceedings pending before this court.

8. Whether fundraising that is coordinated among a candidate or a candidate's campaign committee and independent advocacy organizations violates Wis. Stat. ch. 11.

9. Whether a criminal prosecution may, consistent with due process, be founded on a theory that coordinated issue advocacy constitutes a regulated "contribution" under Wis. Stat. ch. 11.

10. Whether the records in the John Doe proceedings provide a reasonable belief that Wisconsin law was violated by a campaign committee's coordination with independent advocacy organizations that engaged in express advocacy speech. If so, which records support such a reasonable belief?

11. If Wis. Stat. ch. 11 prohibits a candidate or a candidate's campaign committee from engaging in "coordination" with an independent advocacy organization that engages solely in issue advocacy, whether such prohibition violates the free speech provisions of the First Amendment to the United States Constitution and/or Article I, Section 3 of the Wisconsin Constitution.

12. Whether pursuant to Wis. Stat. ch. 11, a criminal prosecution may, consistent with due process, be founded on an allegation that a candidate or candidate committee "coordinated" with an independent advocacy organization's issue advocacy.

13. Whether the term "for political purposes" in Wis. Stat. § 11.01(16) is unconstitutionally vague unless it is limited to express advocacy to elect or defeat a clearly identified candidate?

14. Whether the affidavits underlying the warrants issued in the John Doe proceedings provided probable cause to believe that evidence of a criminal violation of Wis. Stat. §§ 11.27, 11.26(2)(a), 11.61(1), 939.31, and 939.05 would be found in the private dwellings and offices of the two individuals whose dwellings and offices were searched and from which their property was seized.; and

IT IS FURTHER ORDERED that within 40 days after the date of this order the Three Unnamed Petitioners in Case Nos. 2013AP2504-2508-W, the Two Unnamed Petitioners in Case No. 2014AP296-OA, and the Unnamed Movants in Case Nos. 2014AP417-421-W (collectively, the Unnamed Movants) must file a brief in this court; that within 30 days of filing Special Prosecutor Francis A. Schmitz, John Doe Judge Gregory A. Peterson, and Chief Judges Gregory

Potter, James Daley, James Duvall and Jeffrey Kremers, must file either a response brief or a statement that no response brief will be filed; and that if a response brief is filed by Special Prosecutor Francis A. Schmitz, John Doe Judge Gregory A. Peterson, and/or Chief Judges Gregory Potter, James Daley, James Duvall and Jeffrey Kremers, within 10 days of filing the Unnamed Movants must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that the portions of the opening brief(s) of the Unnamed Movants that are referenced in Wis. Stat. § (Rule) 809.19(1)(d), (e), and (f) shall not exceed 100 pages if a monospaced font is used or 22,000 words if a proportional serif font is used. The portions of the response brief(s) of Special Prosecutor Francis A. Schmitz, John Doe Judge Gregory A. Peterson, and Chief Judges Gregory Potter, James Daley, James Duvall and Jeffrey Kremers that are referenced in Wis. Stat. § (Rule) 809.19(1)(d), (e), and (f) shall not exceed 150 pages if a monospaced font is used or 33,000 words if a proportional serif font is used. Any reply brief(s) filed by the Unnamed Movants shall not exceed 26 pages if a monospaced font is used or 6,000 words if a proportional serif font is used; and

IT IS FURTHER ORDERED that the parties shall file their respective original briefs and 22 copies thereof under seal and the clerk of this court shall maintain all such briefs under seal, pending further order by this court. In addition, at the time of filing the original brief, the parties shall also file 17 redacted copies of each brief, in which matters that are covered by the secrecy orders entered by the John Doe Judge or that are otherwise confidential shall be redacted. The redacted copies shall initially be maintained under seal by the clerk of this court. Two copies of each redacted brief shall be served on all other parties to these proceedings, and all other parties shall have 20 days after the filing of the redacted copies to file a written objection to the redacted copy, which objects to either insufficient redaction or excessive redaction. Each such written objection must specify which words, sentences or paragraphs the objector either wants to be redacted or unredacted, and must provide reasons for each such objection. If no objections are received within the 20-day period, the clerk of this court will place a copy of the redacted version of the brief into the public court file on the third day following the expiration of the 20-day period. If an objection is received, the redacted versions shall remain under seal until such time as the court rules on the objection and issues a written order directing the clerk of this court to place a redacted version of the brief into the public court file; and

IT IS FURTHER ORDERED that the clerk of this court shall continue to maintain as sealed all previously filed documents in these proceedings that have been maintained or treated as sealed up to the date of this order, subject to the provisions of the following paragraph; and

IT IS FURTHER ORDERED that on or before February 27, 2015, each party that has previously filed in the court of appeals or in this court any document that has been maintained

under seal until the date of this order shall for each such document either file a written statement that the document may be placed into the public court file or file a redacted version of the document in which matters that are covered by the secrecy orders entered by the John Doe Judge or that are otherwise confidential shall be redacted. (This requirement does not apply to documents filed in the court of appeals in Case Nos. 2013AP2504-2508-W.) Each party shall serve on all other parties a copy of the statement that the document may be placed into the public court file or two copies of the redacted version of the previously filed document. All other parties shall have 20 days after the filing of the statement or redacted copies to file a written objection to the statement or the redacted copy, which objects to either insufficient redaction or excessive redaction. Each such written objection must specify which words, sentences or paragraphs the objector either wants to be redacted or unredacted, and must provide reasons for each such objection. If no objections are received within the 20-day period, the clerk of this court will place either the original previously filed document (in the case of a statement) or a copy of the redacted version of the previously filed document into the public court file on the third day following the expiration of the 20-day period. If an objection is received, the original document and the redacted versions shall remain under seal until such time as the court rules on the objection and issues a written order directing the clerk of this court to place the original or a redacted version of the previously filed document into the public court file; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of any document filed either in the court of appeals or in this court; instead, any material in these documents upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that the first brief filed in this court must contain, as part of the appendix, a copy of the decision of the court of appeals in Case Nos. 2013AP2504-2508-W and the relevant written decisions and orders of the John Doe Judge; and

IT IS FURTHER ORDERED that within 30 days after the date of this order, each party must provide the clerk of this court with 10 copies of the brief previously filed on behalf of that party in the court of appeals in Case Nos. 2013AP2504-2508-W; and

IT IS FURTHER ORDERED that within 15 days of the date of this order the clerk of the Milwaukee County circuit court shall assemble the record in Case No. 2012JD23, identify by number each paper, and prepare a list of the numbered papers pursuant to the directives of Wis. Stat. § (Rule) 809.15. Also within 15 days of the date of this order the clerk of the Dane County circuit court shall assemble the record in Case No. 2013JD9, identify by number each paper, and prepare a list of the numbered papers pursuant to the directives of Wis. Stat. § (Rule) 809.15. As soon as the records have been assembled and the lists of numbered papers have been prepared, the clerks of each circuit court shall submit the lists to John Doe Judge Gregory A. Peterson for

his review of the list with respect to whether each list contains any confidential information and for his approval. Within 20 days after the date of this order, the final version of the lists of numbered papers and the assembled records shall be transmitted by each circuit court clerk to the clerk of this court. There shall not be any opportunity for any party to inspect the record prior to their transmission to this court. When the lists of numbered papers have been approved by Judge Peterson, each clerk of the circuit court shall send a copy of that clerk's list of numbered papers to the persons listed on this order. The record in Milwaukee County Case No. 2012JD23 and the record in Dane County Case No. 2013D9 shall constitute the record for purposes of these proceedings in this court. This shall not alter the status of the papers in those records with respect to their confidentiality or change the ability of the Unnamed Movants, their counsel, or any other person to view any parts of the records; and

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petition will abide the decision of this court on review; and

IT IS FURTHER ORDERED that the motion to add five individuals as additional respondents in Case Nos. 2013AP2504-2508-W is denied; and

IT IS FURTHER ORDERED that the parties will be notified of the date, the time, and the procedures for oral argument in these matters in due course.

ANN WALSH BRADLEY, J., did not participate. See attached letter to counsel setting forth reasons for recusal.

¶1 SHIRLEY S. ABRAHAMSON, C.J. *(concurring).* I join Justice Prosser's concurrence. In addition, I offer the following comments relating not only to the parties' interests in the order but to the public's rights and interests.

¶2 Most documents filed in the three cases have been under seal, not open to the public. Some documents have been disclosed to some of the participants but not to other participants. The court has never ruled on any of the several motions to seal the documents. Instead, the clerk of the Supreme Court has kept those filings under seal on the grounds that the motions to seal remain pending before this court.

¶3 The public should, to the extent possible, be given access to documents that are the bases of the cases, as well as to the briefs (and appendices) filed in this court, to the oral arguments, and to the opinion(s) of this court. The court's order does not give adequate consideration to the public nature of the parties' arguments and the opinion(s) of this court. These issues may be down the road a piece, but now is the time to think about the road we are constructing and where it will ultimately lead.

¶4 More particularly the order is problematic in several respects, including the following:

1. The order groups the array of participants into two constellations: the eight unnamed participants on the one side (referred to in the order as "unnamed movants") and the special prosecutor, John Doe judge, and five chief judges on the other side. Missing from the constellations are the five district attorneys who, in my opinion, should be made parties as requested. The court order denies a "motion to add five individuals as additional respondents in Case Nos. 2013AP2504-2508-W." Aren't the district attorneys more involved in the John Doe proceedings than the chief judges?

   Furthermore, the persons in each of these two constellations are not necessarily involved in all three cases and their interests may not be aligned. On the unnamed participants' side, it is possible, perhaps probable, that the court will get eight separate briefs-in-chief, each at least 100 pages. Each of the several response briefs may be 150 pages. Then there are reply briefs. Conceivably each of the parties can have a different take on each of the 14 enumerated issues (plus the subparts). The array of issues that may be presented in the massive briefs filed is staggering.

2. The court's order consolidates the three cases only for purposes of briefing and argument. The court's order does not change the burden of proof (the burden of going forward with the evidence and the burden of persuasion) for each issue in each of the three cases. The several cases might impose different burdens on each party for the same issue. To assist the court, I would ask each party to clearly state the issue (and the case in which it arises) that the party is addressing and the standard of review and the burden of proof for that issue.

3. Assembling and transmitting the appellate record in the three cases presents an especially thorny set of problems because most documents filed in this court or the court of appeals were accepted under seal.

   Ordinarily, briefing does not begin here until a circuit court record is assembled and transmitted to this court. The circuit court record from only two of the five counties will come up to this court, and these records remain subject to the secrecy orders entered by the John Doe judge. The John Doe judges' secrecy orders are themselves sealed. Thus many of the documents in the circuit court record will be unavailable to the unnamed participants, their counsel, and any other person.

And although, according to the court's order, the appellate filings in the court of appeals and in this court must be made available to the public and the unnamed participants to the extent allowed by the John Doe secrecy orders, it is safe to assume that these filings will be heavily redacted, with many pages entirely withheld. It is also safe to assume that there will be disputes about which appellate filings should and should not remain secret.

For example, the court's order appears to assume that the same secrecy orders that applied to proceedings and filings before the John Doe judge should apply to appellate proceedings and filings in this court. Is such an assumption justified?

These kinds of informational difficulties and discrepancies may be endemic to appellate review of John Doe proceedings, but the court's order does not adequately deal with them. The order provides a briefing schedule that might end before agreement on the redaction of the sealed appellate filings is reached.

It will be difficult, for example, for the unnamed participants to discuss whether the affidavits underlying the warrants issued in the John Doe proceedings were legally sufficient when the unnamed participants are unable to see the affidavits themselves. See Order, Issue No. 14.

4. With respect to Issue No. 14 enumerated in the order, I would ask the parties to address whether the probable cause standard is different for search warrants and subpoenas in John Doe proceedings than it is for search warrants and subpoenas in other contexts. See In re Doe Proceeding Commenced by Affidavit Dated July 25, 2001, 2004 WI 149, 277 Wis. 2d 75, 689 N.W.2d 908 (relating to the probable cause standard for subpoenas in John Doe proceedings); State v. Washington, 83 Wis. 2d 808, 843-45, 266 N.W.2d 597 (1978) (same); cf. United States v. R. Enters., Inc., 498 U.S. 292, 297-302 (1991) (relating to the probable cause standard for subpoenas in a federal grand jury proceeding).

5. One of the three cases the court is accepting is an original action. A petition for an original action, by its nature, might not initially have a record connected with it. If a petition for an original action has no statement or stipulation of facts, this court ordinarily directs the parties (or appoints a master) to submit a stipulation of facts and a list of factual issues on which the parties cannot agree.

The inherent factual and legal complications in this case provide all the more reason for this court to follow its standard practice here regarding a

statement of facts. See Supreme Court Internal Operating Procedures, II.B.3. (The Supreme Court generally will not exercise its original jurisdiction in matters involving contested issues of fact.)

The court's failure to follow its standard practice regarding a statement of facts in the instant original action portends difficulties down the road.

6. This court's role is to decide questions of law, not facts, and thus this court may not supply findings of fact that the John Doe judge did not make.

Specific facts are essential to resolve the complex legal issues presented. One set of facts needed is a description of the advocacy at issue. These facts are needed, for example, to determine whether the advocacy was issue advocacy or express advocacy.

Furthermore, this court is to decide whether, and if so, how, the unnamed participants "coordinated" with any campaign committees; whether the "coordination" violates the Wisconsin campaign finance laws; and if so, whether those campaign finance laws comply with the mandates of the federal and state constitutions. The Seventh Circuit Court of Appeals commented: "The [United States] Supreme Court has yet to determine what 'coordination' means." O'Keefe v. Chisholm, 769 F.3d 936, 941 (7th Cir. 2014).

How can this court resolve these legal issues without knowing what types and levels of "coordination" occurred? Without facts relating to what the unnamed participants and any campaign committees did, the court will be left to decide important and complex legal issues in a vacuum. The court cannot fill in the record with its own factual assumptions and hypotheticals.

The Seventh Circuit Court of Appeals commented that the "claim to constitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee has not been established 'beyond debate.' To the contrary, there is a lively debate among judges and academic analysts. No opinion issued by the [United States] Supreme Court, or by any court of appeals, establishes ('clearly' or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups——let alone that the First Amendment forbids even an inquiry into that topic." O'Keefe, 769 F. 3d at 942 (emphasis in original).

Here this court is being asked to decide these very complex issues with few, if any, settled facts and with the investigatory inquiry not having proceeded beyond a preliminary stage.

7. The court's order refers to independent organizations without using quotation marks around the word "independent." The Seventh Circuit Court of Appeals has cautioned that the word "independent" should be considered as being in quotation marks at all times "because the prosecutor suspected that the group's independence is ostensible rather than real." O'Keefe, 769 F.3d at 937.

8. The order directs that the record in Milwaukee and Dane counties, rather than the record in all five counties involved in the John Doe proceedings, be assembled and transmitted to this court. The court is not certain that the records filed only in these two counties contain all the documents that were filed in the other three counties. Yet the court is deeming the records of two counties to be the entire record upon which this court might base a decision.

9. The phrasing of some of the issues is not as neutral as I might prefer. Some of the issues are taken from a party's filings, and a party often writes a question in a way to stimulate a favorable response from the court. Moreover, the phrasing of some issues rests on unproven assumptions or on assumptions with which some parties agree and others do not. The parties should point out in their briefs any problems with the questions posed and any assumptions with which the party disagrees. The court intends, in my opinion, that its statement of the issues be neutral; the court does not, in my opinion, intend to accept any party's unproved assumptions.

¶5 For the reasons set forth, I join Justice Prosser's concurrence and provide these additional considerations.

¶6 DAVID T. PROSSER, J. *(concurring).* I support the court's decision to grant the petitions in all three proceedings. I do not agree with the court's decision to "consolidate" "these three proceedings" "for purposes of briefing and oral argument."

¶7 These matters are important to the people of Wisconsin. They require the court's best effort and they require the best effort of all counsel. The present order is so complex that it makes "best effort" by anyone nearly impossible.

¶8 In my view, the court should divide the multiple issues into at least two separate cases, one relating to questions of procedure, including appointment of the John Doe special prosecutor, and one relating to the interpretation and constitutionality of campaign finance

statutes. The court should hear argument in these cases on different days, so that interested parties will have sufficient time to argue their positions and the court will have sufficient time to digest the information presented.

¶9 As I understand the order, each "Unnamed Movant" is entitled to file a separate opening brief and a separate reply brief. The court realizes that the multiple Unnamed Movants are not indistinguishable and may not always be aligned. Given the nature of the case, this court is in no position to compel "coordination" in terms of how many briefs will be filed, who will argue specific issues, and what the arguments will be. Even the apportionment of time for argument may be contested.

¶10 There are significant issues involving the "facts" upon which the parties and this court may rely, i.e., the "record" and its completeness as well as the enormous problem of sealed documents. The order contemplates that disputes relating to redaction of unsealed documents will be decided by this court without providing a blueprint of how or when the court will discharge this responsibility.

¶11 The order presumes that none of the above-stated problems will cause delay. I do not retreat from my decision to grant the petitions, but I think the court is making a mistake in its failure to assist counsel by addressing and ameliorating some of the problems inherent in the order.

¶12 For the foregoing reasons, I respectfully concur.

¶13 I am authorized to state that CHIEF JUSTICE SHIRLEY S. ABRAHAMSON joins this concurrence.

Diane M. Fremgen
Clerk of Supreme Court

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December 15, 2014

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Re: Nos. 2014AP417-W – 2014AP421-W
State of Wisconsin ex rel. Francis D. Schmitz v. The Hon. Gregory A. Peterson, John Doe Judge, Eight Unnamed Movants, and Interested Party

Dear Counsel:

Unnamed movants have filed three petitions to bypass in the above-captioned case. Listed as one of the attorneys who is representing a movant is Attorney Dean Strang. My son,

John Bradley, practices law with Attorney Strang.

I have been advised that John has had no involvement with this petition to bypass and will not have any involvement with it. He is not acting as a lawyer in this proceeding. It is my understanding that any fee agreement is on an hourly basis and not on the basis of a contingent fee.

Under these facts and circumstances the question of recusal comes to the fore. It is not an easy decision. I am mindful that judicial impartiality is a basic premise of our jurisprudence, and it is the responsibility of a judge to protect the integrity and dignity of the judicial process from the appearance of partiality as well as from actual bias.

In response to an issue of recusal, there is a natural tendency for judges to say "I can be fair and impartial." But that is not the test. After all, the judge in the seminal recusal case of Caperton v. A.T. Massey Coal Co., 566 U.S. 868 (2009), three times proclaimed that he could be fair and impartial in response to as many motions for recusal. Nevertheless, the United States Supreme Court held that the Due Process Clause of the United States Constitution required that he not participate in the case.[1]

The Court made clear that a judge's self-proclaimed fairness does not resolve the recusal inquiry. Such a subjective response is but one step in the analysis. Due process mandates the application of an objective standard which "may also require recusal whether or not actual bias exists or can be proved." Id. at 886.

In reaching my decision on recusal, I have examined the Wisconsin Code of Judicial Conduct, Wis. Stat. § 757.19, Wisconsin Judicial Conduct Advisory Committee Opinion 00-1, other state and national ethics opinions, commentaries on judicial ethics, and relevant case law. I have also consulted with the Executive Director of the Wisconsin Judicial Commission.

Even though I subjectively believe that I could be fair and impartial in this case, I nevertheless determine that recusal is required here. Due process requires not only a consideration of fairness, but also the appearance of fairness. Siefert v. Alexander, 608 F.3d 974, 985 (7th Cir. 2010). "To perform its high function in the best way, justice must satisfy the appearance of justice." Id. (quoting In re Murchison, 349 U.S. 133, 136 (1955). In applying the objective standard mandated by due process, I conclude that under the facts and circumstances "reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice

[1] The recusal issue in Caperton involved campaign contributions and expenditures in a judicial election. The recusal issue I address involves a lawyer relative who is a member of the firm appearing before the court. An objective standard implementing the Due Process Clause applies to both. Caperton v. A.T. Massey Coal Co., 566 U.S. 868, 883 (2009).

Caperton makes clear that not every contribution or expenditure requires recusal. Id. at 884 ("The inquiry [regarding recusal] centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.")

system and aware of the facts and circumstances" could reasonably question a judge's ability to be impartial. SCR 60.04 (4).

The Wisconsin Code of Judicial Conduct takes a case-by-case approach to the question whether a judge can participate in a case when a law firm with which a family member is affiliated as an attorney appears but the relative is not involved in the case. See Comment to SCR 60.04 (4) (e).

SCR 60.04(4) specifically provides:

> (4) 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: . . .
>
> (e) The judge or the judge's spouse, or a person within a third degree of kinship to either of them, or the spouse of such a person meets one of the following criteria:
>
> 1. Is a party to the proceeding or an officer, director or trustee of a party.
> 2. Is acting as a lawyer in the proceeding.
> 3. Is known by the judge to have more than a de minimus interest that could be substantially affected by the proceeding.
> 4. Is to the judge's knowledge likely to be a material witness in the proceeding.

The comment to the rule sheds further light on how the rule is to be interpreted and applied. It states:

> Comment: The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself require the judge's recusal. Under appropriate circumstances, the fact that the judge's impartiality may reasonably be questioned or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" may require the judge's recusal.

None of the provisions that mandate recusal applies here. My son is neither a party nor a witness. Additionally, the facts indicate that he is not acting as a lawyer in the proceeding and because the fee agreement is not contingent, any interest that he may have is not "substantially affected by the outcome of the proceeding."

Nevertheless, a judge is to avoid even the appearance of partiality. Wisconsin Judicial Conduct Advisory Committee Opinion 00-1 lists factors to consider in making a recusal decision involving a lawyer relative. Those factors include: (a) the appearance to the general public of the failure to recuse; and (b) the appearance to other attorneys, judges and members of the legal system of the failure to recuse.

Other states have considered additional factors that include: The nature of the action (Tennessee Advisory Opinion 04-1); whether the relative's name appears in the firm name (Colorado Advisory Opinion 05-2); the size of the firm (Colorado Advisory Opinion 05-2, Illinois Advisory Opinion 94-18, Tennessee Advisory Opinion 04-1, Washington Advisory Opinion 88-12); whether the fee in the case is contingent or hourly (Tennessee Advisory Opinion 04-1); and whether the relative's position is as associate, partner, shareholder, or of counsel (Colorado Advisory Opinion 05-2; Illinois Advisory Opinion 94-18; Washington Advisory Opinion 88-12).

This court has been subject to extensive criticism for its recusal rules and practices. Weak recusal rules and lapses in recusal practices undermine the public trust and confidence in a fair and impartial judiciary.

We have an obligation, and the public has a right, to hold judges to high ethical standards. Judicial integrity lies at the heart of the public's respect for judicial decisions and their legitimacy.

Therefore, for the reasons set forth above, I am not participating in the petitions to bypass.

Respectfully,

Ann Walsh Bradley, Justice