SUPREME COURT
STATE OF WISCONSIN
STATE CAPITOL
P. O. BOX 1688
MADISON, WISCONSIN 53701

CHAMBERS OF
ANN WALSH BRADLEY, JUSTICE

(608) 266-1886

March 19, 2014

Matthew W. O'Neill
Fox O'Neill Shannon
622 N. Water Street, Suite 500
Milwaukee, WI 53202

David C. Rice
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Francis D. Schmitz
P.O. Box 2143
Milwaukee, WI 53201-2143

Dean A. Strang
StrangBradley, LLC
10 East Doty Street, Suite 1002
Madison, WI 53703

J.B. Van Hollen
Wisconsin Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael J. Bresnick
Stein Mitchell Muse & Cippollone
1100 Connecticut Avenue, NW
Washington, DC 20036

Todd P. Graves
Graves Garrett LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105

Edward D. Greim
Graves Garrett LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105

Edward H. Meyers
Stein Mitchell Muse & Cippollone
1100 Connecticut Avenue, NW
Washington, DC 20036

Philip J. O'Beirne
Stein Mitchell Muse & Cippollone
1100 Connecticut Avenue, NW
Washington, DC 20036

Michael O'Grady
P.O. Box 2
Portage, WI 53901

A. John Voelker
Director of State Courts
P.O. Box 1688
Madison, WI 53701-1688

Re: No. 2013AP2504 – 2013AP2508
State of Wisconsin ex rel. Three Unnamed Petitioners v. The Hon. Gregory A. Peterson, John Doe Judge

Dear Counsel:

Proposed Intervenor Michael O'Grady has submitted an unsealed Motion to Intervene in a Petition for Review. Three unnamed petitioners seek review of the court of appeals denial of a petition for supervisory writ. Listed as one of the attorneys who is representing an unnamed petitioner 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 for review. 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, and that the specific rules set forth in the Wisconsin Code of Judicial Conduct do not mandate recusal, I nevertheless determine that recusal is required here. 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 system and aware of the facts and circumstances" could reasonably question a judge's ability to be impartial. SCR 60.04 (4).

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[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.")

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." As noted above, I subjectively believe that I could be fair and impartial in this action.

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.

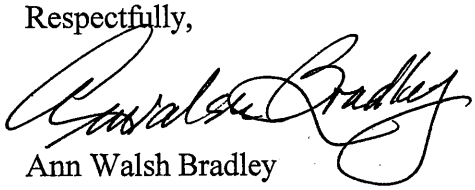
Other states have considered additional factors that include: The nature of the action (Tennessee Advisory Opinion 04-1); whether the relative's name appears in the firm name (Colorado Advisory Opinion 05-2); the size of the firm (Colorado Advisory Opinion 05-2, Illinois Advisory Opinion 94-18, Tennessee 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 motion for intervention or the underlying petition for review.

Respectfully,



Ann Walsh Bradley

cc: Diane Fremgen, Clerk of Supreme Court
Chief Justice Shirley S. Abrahamson
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience Drake Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman