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**RECEIVED**

MAY 08 2012

CLERK OF SUPREME COURT  
OF WISCONSIN

May 8, 2012

**Via Facsimile (608) 267-0640**  
**& U.S. Mail**

Justice Michael J. Gableman  
Wisconsin Supreme Court  
P.O. Box 1688  
State Capitol  
Madison, Wisconsin 53701

Re: In the Matter of Judicial Disciplinary Proceedings Against the  
Honorable David T. Prosser, Jr.  
Case No. 12AP5665-J

Dear Justice Gableman:

As you know, the Wisconsin Judicial Commission has filed a two-count complaint against Justice David Prosser in the Wisconsin Supreme Court. The complaint will remain in the Supreme Court until the Court issues an order sending the matter to the Chief Judge of the Court of Appeals for the appointment of a three-judge panel. These orders are issued after a decision by all participating members of the court. This has been the practice of the Supreme Court for many years. For examples, see 2000AP640-J, 2004AP2954-J, 2007AP2066-J and 2008AP2458-J. If the matter is referred, the three judge panel would be expected to conduct an evidentiary hearing equivalent to a trial and then make findings of fact, conclusions of law and recommendations to the Supreme Court. Wis. Stat. § 757.89.

From my review of Wis. Stat. § 757.19(2)(b), I believe it is clear that you are disqualified by law from sitting as a judge in any part of this matter. You are a "material witness" who was present at the incident on June 13, 2011, and you gave a lengthy statement to the Dane County Sheriff's Department. Although you were not present at a meeting of the closed conference on February 10, 2010, you were the subject of that meeting, which reportedly dealt in part with multiple recusal motions filed against you in criminal cases at the instigation of Attorney Robert Henak.

There is little doubt that you will be called as a fact witness regarding the June 13 incident and asked to provide context for the February 10, 2010 incident if there is an evidentiary hearing. In addition, you are likely to be asked to give a deposition because the Commission completely disregarded your statement about the June 13 incident and was not interested in factual context in fashioning either of its charges against Justice Prosser.

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Because you meet every qualification of a "material witness" who is disqualified under Wis. Stat. § 757.19(2)(b), I do not see how you could sit as a judge in any part of this case. Recusal under the objective standards of Wis. Stat. § 757.19(2) is mandatory. Recusal does not necessarily implicate the fairness of a judge, and no inference about your fairness and objectivity should be drawn from this letter.

I believe it would be pointless for the Supreme Court to initiate a proceeding that must come back to a court when it is known now that every member of the Court is disqualified by law. No one knows better than you the futility that comes from receiving a unanimous favorable recommendation from a Judicial Conduct Panel that the Supreme Court is not able to approve. In Justice Prosser's case, the entire Supreme Court is disqualified from ever vindicating him, just as it is disqualified from ever disciplining him.

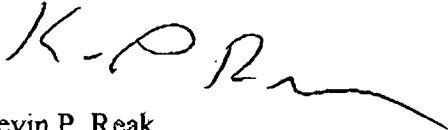
The statute requires that disqualification must occur "when the factors creating such disqualification first become known to the judge." See Wis. Stat. 757.19(4). As a result, a vote on an order to the court of appeals would put a justice in jeopardy of an ethics violation no matter how the justice voted.

Consequently, I am writing to request, with the greatest respect, that you withdraw from participation in this matter.

Thank you for your consideration.

Very truly yours,

GUNTA & REAK, S.C.

A handwritten signature in black ink, appearing to read "K-P Reak", with a long horizontal flourish extending to the right.

Kevin P. Reak

KPR/jaz

cc: Clerk, Wisconsin Supreme Court Attn: Carrie (Via Facsimile - (608) 267-0640 & U.S. Mail)  
Frank Gimbel, Esq.  
Honorable Richard Brown  
Justice David T. Prosser  
Gregg J. Gunta, Esq.