

IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

FILED

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CLERK OF SUPREME COURT
OF WISCONSIN

In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable David T. Prosser, Jr.

Case No. 12AP566X - J

Wisconsin Judicial Commission,

Complainant

v.

The Honorable David T. Prosser, Jr.,
Respondent.

RESPONDENT'S MOTION TO RECUSE JUSTICE ANN WALSH BRADLEY

The Honorable Justice David T. Prosser, Jr., by his attorneys, GUNTA & REAK, S.C., moves Justice Ann Walsh Bradley to recuse herself from the above entitled matter pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution; Article I, Section 8 of the Wisconsin Constitution; Wis. Stat. §757.19 (2)(b), (f), and (g); and SCR 60.04(4) of the Wisconsin Code of Judicial Conduct. This motion anticipates that Justice Bradley will recognize that she must not participate as a judge in this case. She is not only a material witness, but also a complaining witness and thus disqualified by law. If she were to participate as a judge at any stage of the proceedings in this matter, she would deprive Justice Prosser of the due process of law guaranteed under the Fourteenth Amendment to the United States Constitution, and Article I, Section 8 of the Wisconsin Constitution.

AS GROUNDS for this recusal motion, Justice Prosser asserts the following:

The right to a fair trial includes the right to be tried by an impartial and unbiased judge. State v. Walberg, 109 Wis.2d 96, 105, 325 N.W.2d 687 (1982); see also State v. Washington, 83 Wis.2d 808, 833, 266 N.W.2d 597 (1978); State v. Bell, 62 Wis.2d 534, 536-37, 215 N.W.2d 535 (1974). In State ex rel. Mitchell v. Bowman, 54 Wis.2d 5, 7, 194 N.W.2d 670 (1972), the court stated that: “no person... should be tried by a judge... prejudiced against him. Every person has a right to a fair trial by an impartial judge and jury; due process requires this.”¹

Although a party is sometimes required to make a showing of prejudice to support a recusal motion, this is not necessary in circumstances where the legislature has enumerated one or more situations in which the judge is disqualified by law.

Beyond statutory disqualification, the law has long embodied the core principle that “[n]o man [or woman] is allowed to be a judge in his [or her] own case,” Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S.Ct. 2252, 2259 (2009) (quoting The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison), because the person’s interest would certainly bias the person’s judgment and “not improbably, corrupt [the person’s] integrity.”

“Every procedure which would offer a possible temptation to the average [person] as a judge... not to hold the balance nice, clear, and true between [government authority] and the accused denies the latter due process of law.” Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437 (1927) (quoted in Caperton, 129 S. Ct. at 2261).

¹ See also State v. Hollingsworth, 160 Wis.2d 883, 893, 467 N.W.2d 555, 559 (Ct. App. 1991) (“A person’s right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment of the United States Constitution.”).

The situations in which a judge is legally required to disqualify himself or herself are set out in Wis. Stat. § 757.19(2) (a) - (g). The pertinent provisions are:

- (2) Any judge shall disqualify himself or herself from any civil... action or proceeding when one of the following situations occurs:
 - (b) When a judge is a party or a material witness...
 - (f) When a judge has a significant... personal interest in the outcome of the matter...
 - (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.

All these provisions disqualify Justice Bradley.

Furthermore, the Code of Judicial Conduct mandates that, "A judge shall perform judicial duties without bias or prejudice." SCR 60.04(1)(c). A judge "shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4) or disqualification is required under section 757.19 of the statutes and except when judge substitution is requested and granted."

SCR 60.04 (1) (a). Subsection (4) of SCR 60.04 goes on to explain when recusal is necessary:

SCR 60.04(4) reads, in relevant part:

- (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:
 - (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.

* * *

- (e) The judge or the judge's spouse, or a person within the 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 a more than de minimis interest that could be substantially affected by the proceeding.
 4. Is to the judge's knowledge likely to be a material witness to the proceeding.

In applying the aforementioned criteria to the instant action, it is evident that Justice Bradley is disqualified from participation in this matter and must withdraw. Justice Bradley is not only a material witness but also the central figure in leaking skewed representations of both incidents cited in the complaint to the news media, initiating a criminal investigation against Justice Prosser, and contacting the Judicial Commission to press a complaint against him. On information and belief, Justice Bradley has had follow up communications with the Judicial Commission, including possible testimony, and orchestrated a public relations campaign to discredit Justice Prosser. If this matter proceeds, Justice Bradley will be subject to discovery and will necessarily serve as the principal fact witness to support the Commission's complaint. She has a vital personal "interest" in establishing that she was in "control" of her actions and her emotions on the evening of June 13, 2011, contrary to representations by Justice Prosser. Against this background, Justice Bradley cannot turn around and sit in judgment in her own case, and no rational person would believe that she could.

Justice Bradley joined Chief Justice Abrahamson's dissent in State v. Henley, 2011 WI 67, ¶ 45 n. 4, 338 Wis.2d 610, 802 N.W.2d 175, 186, in which the Chief Justice quoted In re Murchison,

349 U.S. 133, 136 (1955), that “[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.”

This passage is especially instructive given Justice Bradley’s demonstrated hostility to Justice Prosser before and after the incidents set out in the Commission’s complaint, including her extensive joint effort with Chief Justice Abrahamson to recruit candidates to run against Justice Prosser in 2011.

Based on the unique factual circumstances surrounding the disciplinary proceedings initiated against Justice Prosser by Justice Bradley and Justice Bradley’s direct involvement in them, Justice Bradley’s recusal is not only appropriate, but also necessary to satisfy the appearance of justice, and to ensure that this Court acts as an impartial decision maker.

For the forgoing reasons, The Honorable David T. Prosser, Jr., requests that Justice Bradley recuse herself, effective immediately.

Respectfully submitted at Milwaukee, Wisconsin this 11th day of April, 2012.

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