



Supreme Court of Wisconsin

16 EAST STATE CAPITOL
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Shirley S. Abrahamson
Chief Justice
Ann Walsh Bradley
N. Patrick Crooks
David T. Prosser, Jr.
Patience Drake Roggensack
Annette Kingsland Ziegler
Michael J. Gableman
Justices

Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

A. John Voelker
Director of State Courts

A. John Voelker
Acting Clerk of Supreme Court

August 18, 2011

Michael D. Dean
First Freedoms Foundation, Inc.
P.O. Box 2545
Brookfield, WI 53008

Kurt C. Kobelt
Wisconsin Education Association
P.O. Box 8003
Madison, WI 53708

Richard M. Esenberg
8900 N. Arbon Dr.
Milwaukee, WI 53223

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

James R. Troupis
Christ T. Troupis
Sarah E. Troupis
Troupis Law Office LLC
7609 Elmwood Ave., Ste. 102
Middleton, WI 53562

Kirby E. Brant
1526 Golf View Rd., #G
Madison, WI 53704-7017

Thomas C. Bellavia
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Randy Elf
Joseph A. Vanderhulst
Bopp, Coleson & Bostrom
The National Building
1 South Sixth St.
Terre Haute, IN 47807-3510

Clayton Patrick Kawski
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Maureen Martin
W3643 Judy Lane
Green Lake, WI 54941

Robert H. Friebert
Jeremy P. Levinson
Friebert, Finerty & St. John
330 E. Kilbourn Ave., Ste. 1250
Milwaukee, WI 53202-3145

Edwin J. Hughes
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Mary Bell
60 Kessel Court, Apt. 5
Madison, WI 53711

August 18, 2011

Page 2

No. 2010AP1937-OA, Wisconsin Prosperity Network v. Myse

Jason A. Adkins
Anthony B. Sanders
Lee U. McGrath
Institute for Justice
527 Marquette Ave., Ste. 1600
Minneapolis, MN 54402

Ben Manski
Liberty Tree
520 University Ave., Ste. 240
Madison, WI 53703

Mitchell R. Olson
Axley Brynelson, LLP
P.O. Box 1767
Madison, WI 53701-1767

Stephen M. Hoersting
Center for Competitive Politics
124 S. West St., Ste. 201
Alexandria, VA 22314

Re: Wisconsin Prosperity Network v. Myse; 2010AP1937-OA

Dear Counsel:

As you know, the case of Wisconsin Prosperity Network v. Myse is presently scheduled to be argued before the Supreme Court on September 6, 2011. Some observers have suggested that I should not participate further in the case, citing SCR 60.04(4) of the Code of Judicial Conduct. Subsection (4) reads as follows:

(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.

(b) The judge of an appellate court previously handled the action or proceeding as judge of another court.

(c) The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter.

(d) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

August 18, 2011

Page 3

No. 2010AP1937-OA, Wisconsin Prosperity Network v. Myse

(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 [i]n the proceeding.

(f) The judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following:

1. An issue in the proceeding.
2. The controversy in the proceeding.

Paragraphs (b), (c), (d), (e), and (f) of subsection (4) do not apply to this matter. However, some of the general language in subsection (4), and paragraph (a) (if interpreted in a certain way to apply to a favorable view of an attorney), may apply.

Third parties point to the fact that Attorney James R. Troupis served as lead counsel for my campaign committee during the recount that followed the Supreme Court election on April 5, 2011. Attorney Troupis has been a friend for two decades and is widely recognized as an expert in election law, so it is not surprising that my committee turned to him last April.

On the other hand, Assistant Attorney General Clayton Kowski, who represents the members of the Government Accountability Board and its executive director, Kevin Kennedy, is a close friend who served as my sole law clerk during the Supreme Court's 2007-2008 term and provided public support in my recent campaign.

Moreover, I know all the named defendants personally. I appeared before Circuit Judge Gordon Myse and Circuit Judge Thomas Cane when I was Outagamie County District Attorney. I supported and contributed to Judge Myse when he ran for the Supreme Court in 1983, and worked hard to persuade Governor Lee Sherman Dreyfus to appoint Judge Cane to the Court of Appeals. I have known Judge Barland for many years and attended his retirement celebration. I also attended the retirement celebration of Judge Michael Brennan in Neillsville. I have been in the homes of Judge Nichol and Judge Deininger and was a close friend of Judge Deininger in the legislature. I have known and worked with Kevin Kennedy for at least 30 years.

August 18, 2011

Page 4

No. 2010AP1937-OA, Wisconsin Prosperity Network v. Myse

In addition, Attorney Robert H. Friebert of Friebert, Finerty & St. John, S.C., who represents the Wisconsin Education Association Council and Mary Bell, endorsed me in my recent campaign.

In sum, when all the facts are examined, I do not have a favorite "horse in this race."

Subsection (6) of SCR 60.04 reads as follows:

(6) A judge required to recuse himself or herself under sub. (4) may disclose on the record the basis of the judge's recusal and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive recusal. If, following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be required to recuse himself or herself and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

The purpose of this letter is to invoke subsection (6) of SCR 60.04 by disclosing to the parties and their attorneys the facts involving my situation. I have no bias or prejudice against any party or party's attorney in this case and a favorable view of multiple attorneys on different sides of the case. Thus, I believe I can be completely impartial. Nonetheless, I respectfully request that the parties and their attorneys confer to determine whether I should participate in the case if it is argued in the near future.

Respectfully,

David T. Prosser, Jr.
Justice

cc A. John Voelker, Acting Clerk of Supreme Court
Chief Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice Patience Drake Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman