



WISCONSIN LEGISLATIVE COUNCIL
PROPOSED REPORT TO THE LEGISLATURE

SPECIAL COMMITTEE ON
JUDICIAL DISCIPLINE AND
RECUSAL

March 18, 2011

PRL 2011-08

Special Committee on Judicial Discipline and Recusal

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March 18, 2011

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PART I

KEY PROVISIONS

OF COMMITTEE RECOMMENDATIONS

The Special Committee on Judicial Discipline and Recusal recommends the following bill drafts to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature.

LRB-1326/1, Relating to Filing a Statement of Reasons When a Judge or Justice Denies a Motion for Disqualification

Current law provides that when a judge or justice is disqualified, the judge or justice must file in writing the reasons for the disqualifications.

LRB-1326/1 provides that a judge or justice also must file in writing the reasons for denying a motion to disqualify the judge or justice. The statement must be filed within 60 days after the conclusion of a civil or criminal action or proceeding.

LRB-1327/1, Relating to Temporary Service by a Court of Appeals Judge in the Supreme Court in Judicial Disciplinary Proceedings (first consideration)

Article VII, Section 11 of the Wisconsin Constitution provides that justices and judges are subject to reprimand, censure, suspension, removal for cause or for disability, by the Wisconsin Supreme Court pursuant to procedures established by the Legislature. Article VII, Section 4 (3) of the Wisconsin Constitution prohibits the temporary appointment of a Court of Appeals judge or Circuit Court judge to the Supreme Court.

The Judicial Commission is charged with investigating the alleged misconduct or permanent disability of a judge. If the Judicial Commission finds probable cause that a judge is engaging or has engaged in misconduct, it files a formal complaint with the Supreme Court. If the Judicial Commission finds probable cause that a judge has a permanent disability, it files a petition with the Supreme Court.

After the Judicial Commission finds probable cause of misconduct or permanent disability and before it files a complaint or petition, the matter is heard by a panel consisting of either three Court of Appeals judges or two Court of Appeals judges and one reserve judge or by a jury. The Supreme Court reviews the findings of fact, conclusions of law, and recommendations submitted following the hearing and determines appropriate discipline or action.

LRB-1327/1 is a proposed constitutional amendment, proposed to the 2011 Legislature on first consideration, that requires that the Supreme Court assign on a temporary basis a Court of Appeals judge to aid in the proper disposition of judicial disciplinary proceedings in the Supreme Court to provide an odd number of justices for the consideration of the proceedings. The person assigned must be the most senior Court of Appeals judge eligible to be assigned.

A proposed constitutional amendment requires adoption by two successive Legislatures, and ratification by the people, before it can become effective.

PART II

COMMITTEE ACTIVITY

Assignment

The Joint Legislative Council established the Special Committee on Judicial Discipline and Recusal and appointed the chairperson by a May 7, 2010 mail ballot. The committee was directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

Membership of the Special Committee was appointed by a June 30, 2010 mail ballot. The final committee membership consisted of one Senator, three Representatives, and eight public members. A list of committee members is included as **Appendix 3** to this report.

Summary of Meetings

The Special Committee held four meetings on the following dates:

August 5, 2010
September 16, 2010
October 14, 2010
November 18, 2010

At the August 5, 2010 meeting, the Special Committee heard testimony from several speakers about the current system by which justices and judges are disciplined. Testimony also included a discussion of whether the current system should be changed and the impact of changes to the current system. The speakers were Justices Patience Roggensack and N. Patrick Crooks, Wisconsin Supreme Court; James Alexander, Executive Director, Wisconsin Judicial Commission; and Mike McCabe, Wisconsin Democracy Campaign.

At the September 16, 2010 meeting, the Special Committee heard testimony from several speakers about the current system of judicial recusal. Testimony also included a discussion of whether the current system should be changed and the impact of changes to the current system. The speakers were Chief Justice Shirley Abrahamson and Justices Patience Roggensack, Ann Walsh Bradley, and N. Patrick Crooks, Wisconsin Supreme Court; Mike McCabe, Wisconsin Democracy Campaign; Mike Wittenwyler, Attorney, Godfrey and Kahn; Marla Stephens, Director, Appellate Division, Wisconsin State Public Defender's Office; Keith Findley, University of Wisconsin Law Center; and Richard Esenberg, Professor, Marquette University Law School.

At the October 14, 2010 meeting, the Special Committee held a public hearing on judicial discipline and recusal and heard testimony from the following speakers: Melanie Ramey, League of Women Voters of Wisconsin; Andrew Cook, Wisconsin Civil Justice Council, Inc.; and John Robinson, Justice at Stake. The committee also discussed legislative options regarding judicial discipline and recusal and requested that some of the options be prepared as bill drafts for further committed discussion.

At the November 18, 2010 meeting, the Special Committee discussed the following bill drafts:

- WLC: 0010/1, relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability.

- WLC: 0011/1, relating to panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration).
- WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration)
- WLC: 0005/1, relating to judicial disqualification based on an objective standard.
- WLC: 0008/1, relating to notice of campaign contributions made to a judge.
- WLC: 0013/1, relating to judicial disqualification based on campaign financial support.
- WLC: 0014/1, relating to the authority of the supreme court to review a decision of a justice to deny a motion to disqualify the justice.
- WLC: 0018/1, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification.

The committee voted to recommend WLC: 0012/2, relating to temporary service by a court of appeals judge in the Supreme Court in judicial disciplinary proceedings (first consideration), and WLC: 0018/2, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification, to the Joint Legislative Council for introduction in the 2011-12 Legislature.

PART III

RECOMMENDATIONS INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, the drafts as recommended by the Special Committee on Judicial Discipline and Recusal.

The Special Committee was directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

LRB-1326/1, Relating to Filing a Statement of Reasons When a Judge or Justice Denies a Motion for Disqualification

Background

Current law provides that when a judge or justice is disqualified, the judge or justice must file in writing the reasons for the disqualifications.

The committee received testimony about the current law requirement that a judge or justice file reasons if he or she is disqualified. The committee recommended that such requirement also apply if a judge or justice denies a motion to disqualify the judge or justice.

Description

LRB-1326/1 provides that a judge or justice also must file in writing the reasons for denying a motion to disqualify the judge or justice. The statement must be filed within 60 days after the conclusion of a civil or criminal action or proceeding.

LRB-1327/1, Relating to Temporary Service by a Court of Appeals Judge in the Supreme Court in Judicial Disciplinary Proceedings (first consideration)

Background

Article VII, Section 11 of the Wisconsin Constitution provides that justices and judges are subject to reprimand, censure, suspension, removal for cause or for disability, by the Wisconsin Supreme Court pursuant to procedures established by the Legislature. Article VII, Section 4 (3) of the Wisconsin Constitution prohibits the temporary appointment of a Court of Appeals judge or Circuit Court judge to the Supreme Court.

The Judicial Commission is charged with investigating the alleged misconduct or permanent disability of a judge. If the Judicial Commission finds probable cause that a judge is engaging or has engaged in misconduct, it files a formal complaint with the Supreme Court. If the Judicial Commission finds probable cause that a judge has a permanent disability, it files a petition with the Supreme Court.

After the Judicial Commission finds probable cause of misconduct or permanent disability and before it files a complaint or petition, the matter is heard by a panel consisting of either three Court of

Appeals judges or two Court of Appeals judges and one reserve judge or by a jury. The Supreme Court reviews the findings of fact, conclusions of law, and recommendations submitted following the hearing and determines appropriate discipline or action.

The committee received testimony about the potential for equally divided decisions in the Supreme Court in cases of judicial discipline, especially in cases of judicial discipline involving a Supreme Court justice. The committee recommended modifications to current law to avoid equally divided decisions in judicial discipline proceedings.

Description

LRB-1327/1 is a proposed constitutional amendment, proposed to the 2011 Legislature on first consideration, that requires that the Supreme Court assign on a temporary basis a Court of Appeals judge to aid in the proper disposition of judicial disciplinary proceedings in the Supreme Court to provide an odd number of justices for the consideration of the proceedings. The person assigned must be the most senior Court of Appeals judge eligible to be assigned.

A proposed constitutional amendment requires adoption by two successive Legislatures, and ratification by the people, before it can become effective.

Appendix 1

Committee and Joint Legislative Council Votes

The following drafts were recommended by the Special Committee on Judicial Discipline and Recusal to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature.

Special Committee Votes

The Special Committee voted to recommend the following two drafts to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature. The votes on the drafts are as follows:

- LRB-1326/1, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification, failed on a vote of Ayes, 6 (Reps. Hebl and Kessler; and Public Members Hurley, Kaminski, Laufenberg, and Schultz); Noes, 4 (Sen. Grothman; Rep. LeMahieu; and Public Members Cross and Davis); and Absent, 2 (Public Members Basting and Diel). [WLC: 0018/1 subsequently became LRB-1326/1.]
- LRB-1327/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration), failed on a vote of Ayes, 6 (Reps. Hebl and Kessler; and Public Members Cross, Hurley, Kaminski, and Laufenberg); Noes, 4 (Sen. Grothman; Rep. LeMahieu; and Public Members Davis and Schultz); and Absent, 2 (Public Members Basting and Diel). [WLC: 0012/1 subsequently became LRB-1327/1.]

Appendix 2

Joint Legislative Council

[Joint Legislative Council Members Who Selected and Appointed Committee and Its Membership]

Co-Chair

FRED A. RISSE

Senate President

100 Wisconsin Avenue, Unit 501
Madison, WI 53703

Co-Chair

MARLIN D. SCHNEIDER

Representative

3820 Southbrook Lane
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DALE SCHULTZ

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MARK MILLER

4903 Roigan Terrace
Monona, WI 53716

ROBERT WIRCH

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Pleasant Prairie, WI 53158

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Minority Leader
N4692 Maple Road
Juneau, WI 53039

REPRESENTATIVES

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Markesan, WI 53946

DEAN KAUFERT

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Neenah, WI 54956

MICHAEL SHERIDAN

Speaker
1032 Nantucket Drive
Janesville, WI 53546

TERESE BERCEAU

4326 Somerset Lane
Madison, WI 53711

THOMAS NELSON

Majority Leader
1510 Orchard Drive
Kaukauna, WI 54130

TONY STASKUNAS

Speaker Pro Tempore
2010 South 103rd Court
West Allis, WI 53227

SPENCER BLACK

5742 Elder Place
Madison, WI 53705

MARK POCAN

309 N. Baldwin Street
Madison, WI 53703

ROBIN VOS

4710 Eastwood Ridge
Racine, WI 53406

JEFF FITZGERALD

Minority Leader
910 Sunset
Horicon, WI 53032

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

Joint Legislative Council

[Current Joint Legislative Council Members Receiving Committee Report]

SENATE MEMBERS

MARY LAZICH, Co-Chair

4405 South 129th Street
New Berlin, WI 53151

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Janesville, WI 53545

ALBERTA DARLING

1325 West Dean Road
River Hills, WI 53217

JON ERPENBACH

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DALE SCHULTZ

515 North Central Avenue
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LENA TAYLOR

1518 West Capitol
Milwaukee, WI 53206

ASSEMBLY MEMBERS

JOAN BALLWEG, Co-Chair

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Markesan, WI 53946

PETER BARCA

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TERESE BERCEAU

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Abbotsford, WI 54405

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960 Rock Ridge Road
Burlington, WI 53105

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

*Terry C. Anderson, Director, Legislative Council Staff
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Appendix 3

Judicial Discipline and Recusal

Representative Gary Hebl, **Chair**
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Representative Frederick Kessler
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Midwest Mediation, LLC
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Chief Judge Mac Davis
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Stephen Hurley, Attorney
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33 East Main Street, Ste. 400
Madison, WI 53703

Lynn Laufenberg
Laufenberg Law Group, S.C.
115 S. 84th Street, Ste. 250
Milwaukee, WI 53214

Senator Glenn Grothman, **Vice-Chair**
151 University Drive 312-N
West Bend, WI 53095

Representative Daniel LeMahieu
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Cascade, WI 53011

Troy D. Cross, Asst. District Attorney
Carl Frederick Administration Bldg.
400 DeWitt Street
Portage, WI 53901

Diane S. Diel, Attorney
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Andrea Kaminski, Executive Director
League of Women Voters of Wisconsin
122 State Street, Ste. 201A
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Professor David Schultz
University of Wisconsin Law School
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STUDY ASSIGNMENT: The Special Committee is directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

12 MEMBERS: 1 Senator; 3 Representatives; and 8 Public Members.

LEGISLATIVE COUNCIL STAFF: Don Salm and Ronald Sklansky, Senior Staff Attorneys; Jessica Karls-Ruplinger, Staff Attorney; and Tracey Young, Support Staff.

Appendix 4

Committee Materials List

(Copies of documents are available at www.legis.state.wi.us/lc)

November 18, 2010

- [WLC: 0005/1](#), relating to judicial disqualification based on an objective standard.
- [WLC: 0008/1](#), relating to notice of campaign contributions made to a judge.
- [WLC: 0010/1](#), relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability.
- [WLC: 0011/1](#), relating to a panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration).
- [WLC: 0012/1](#), relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration).
- [WLC: 0013/1](#), relating to judicial disqualification based on campaign financial support.
- [WLC: 0014/1](#), relating to the authority of the supreme court to review a decision of a justice to deny a motion to disqualify the justice.
- [WLC: 0018/1](#), relating to filing a statement of reasons when a judge or justice denies a motion for disqualification.
- [Memo No. 8](#), *Jurisdiction of the Office of Lawyer Regulation and the Judicial Commission*.

October 14, 2010

- [Memo No. 7](#), *Legislative Options Regarding Judicial Discipline and Recusal*, (October 7, 2010).
- [Testimony](#), submitted by J. Adam Skaggs, Counsel, Democracy Program, Brennan Center for Justice.
- [Testimony](#), submitted by Justice at Stake.
- [Memorandum](#), from William K. Weisenberg, Chair, ABA Standing Committee on Judicial Independence, to ABA Entities and Affiliated Organizations (October 20, 2010), submitted at the request of Public Member Andrea Kaminski.
- [Handout](#), *Recommendations for Improving Judicial Disqualification Practices and Procedures Among the States*, submitted at the request of Public Member Andrea Kaminski.
- [Letter](#), submitted by Justice Patience Roggensack, Wisconsin Supreme Court.

September 16, 2010

- [Memo No. 4](#), *Judicial Disqualification and Recusal* (September 9, 2010).
- [Memo No. 5](#), *Qualification of Judges Under Federal Law and the Due Process* (September 9, 2010).
- [Memo No. 6](#), *Overview of Judicial Recusal Laws and Procedures in the 50 States; Discussion of General Proposals from Other States' laws and Legislation* (September 9, 2010).
 - [Enclosure](#), *American Bar Association Standing Committee on Judicial Independence Report to the House of Delegates*.
- [Report](#), *The New Politics of Judicial Elections 2000 - 2009, Decade of Change*, distributed at the request of Mike McCabe, Wisconsin Democracy Campaign and Andrea Kaminski, League of Women Voters of Wisconsin.
- [Testimony](#), Patience Roggensack, Justice, Wisconsin Supreme Court.
- [Testimony](#), N. Patrick Crooks, Justice, Wisconsin Supreme Court.
- [Enclosure](#) to N. Patrick Crooks testimony.
- [Testimony](#), Marla Stephens, Appellate Division Director, Office of the Wisconsin State Public Defender.
- [Memo](#), to Doug Kammer, President, State Bar of Wisconsin, to Greg O'Meara, S.J., Chair, Criminal Law Section, *Request for State Bar Position on the Integrity of the Justice System*.
- [Board of Governors](#) *adopts policy position reaffirming the essential role of defense attorneys in the criminal justice system*, by Tom Solberg, State Bar of Wisconsin.
- [Testimony](#), Chief Justice Shirley S. Abrahamson.
- [Testimony](#), Ann Walsh Bradley, Justice, Wisconsin Supreme Court.
- [Testimony](#), Wisconsin Democracy Campaign.
- [Memorandum](#) to Members of the Supreme Court, from Judicial Council (June 27, 1990).
- [Testimony](#), Keith Findley, Clinical Professor, University of Wisconsin Law School.

August 5, 2010

- [Memo No. 1](#), *Legislative and Judicial Authority* (July 28, 2010)
- [Memo No. 2](#), *Discipline and Removal of Justices and Judges under Wisconsin Law* (July 28, 2010).
- [Memo No. 3](#), *Overview of Judicial Discipline Procedures and Available Sanctions in the 50 States and the Surrounding States; and An Overview of Federal Law Regarding Judicial Discipline of Federal Judges* (July 28, 2010).
- [Enclosure 1](#), a table outlining and comparing the key aspects of the investigating and adjudicating bodies in the states.
- [Enclosure 2](#), several tables briefly outlining the available informal or private sanctions, and formal sanctions in the 50 states.
- [Report](#), *State of Wisconsin 2009 Judicial Commission Annual Report, 2009 Calendar Year*.