WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 7

TO: MEMBERS OF THE SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND RECUSAL

FROM: Ronald Sklansky, Senior Staff Attorney, and Jessica Karls-Ruplinger, Staff Attorney

RE: Legislative Options Regarding Judicial Discipline and Recusal

DATE: October 7, 2010

This Memo provides legislative options for the consideration of the Special Committee regarding the issues of judicial discipline and recusal. The options have been developed from the testimony of invited speakers, suggestions from Special Committee members, materials presented to the Supreme Court of Wisconsin, and the experience of other jurisdictions. The Memo consists of background information, followed by alternative courses of action that could be taken by the Special Committee. It is anticipated that the members of the Special Committee may offer additional options and offer additional commentary, especially with respect to those options that are presented in a broad format.

JUDICIAL DISCIPLINE

Under Wisconsin law, justices and judges are subject to discipline or removal for misconduct or permanent disability. Wisconsin Constitution Article VII, Section 11, 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 by law. The Legislature has established procedures for judicial discipline or removal in ss. 757.81 to 757.99, Stats. The procedures apply to Supreme Court justices, court of appeals judges, circuit court judges, municipal court judges, and court commissioners.

Justices and Judges Determining Whether a Justice or Judge Should be Disciplined

1. Background

The Judicial Commission, composed of one circuit court judge, one court of appeals judge, two attorneys, and five nonattorneys, is charged with investigating the alleged misconduct of a justice or judge. If the Judicial Commission makes a finding of probable cause of misconduct, the matter is heard

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by a panel consisting of either three court of appeals judges or two court of appeals judges and one reserve judge, unless the Judicial Commission requests a jury hearing. The findings of fact, conclusions of law, and recommendations of the panel, or the jury verdict and recommendations if a jury hearing is requested, are filed with the Supreme Court, along with a formal complaint filed by the Judicial Commission. The Supreme Court reviews the findings of fact, conclusions of law, and recommendations and determines appropriate discipline or action. [ss. 757.83, 757.87, 757.89, and 757.91, Stats.]

At its August 5, 2010, meeting, the Special Committee heard testimony about the impact of the judicial discipline process on the Supreme Court, especially the impact of disciplining Supreme Court justices. The speakers discussed whether an appearance of impropriety exists when the Supreme Court disciplines its own members and the challenges placed on Supreme Court justices in disciplining other justices.

2. Alternatives

The Special Committee could propose to:

a. Change the composition of the Judicial Commission by removing the circuit court judge and court of appeals judge or replacing the judges with nonjudges. [An argument in favor of this proposal is that it addresses a concern about involving judges in the judicial discipline process. An argument against this proposal is that involvement of judges as part of the Judicial Commission is less of a concern because the Judicial Commission acts as a prosecutor in investigating and filing complaints relating to judicial discipline and does not impose the discipline.]

b. Change the composition of the panel by replacing the court of appeals judges with circuit court judges or reserve judges in matters in which a court of appeals judge is the subject of disciplinary proceedings. [An argument in favor of this proposal is that it prevents the participation of court of appeals judges in part of the judicial discipline process if a court of appeals judge is the subject of disciplinary proceedings. An argument against this proposal is that circuit court judges who replace court of appeals judges on the panel may be concerned about the implications of recommending discipline for a court of appeals judge who may later review their circuit court decisions.]

c. Repeal the option for a panel hearing and require that a jury hearing be held for all disciplinary proceedings. [An argument in favor of this proposal is that it removes judges from making recommendations about the discipline of another judge. An argument against this proposal is that a jury hearing may be more burdensome than a panel hearing and may not have the expertise of a panel.]

d. Provide that the panel or jury determine whether discipline should be imposed and how and require that the Supreme Court review the determination of the panel or jury through a limited review. [This proposal limits the role of the Supreme Court in reviewing the panel or jury's determination and gives the panel or jury the authority to impose discipline. It is not clear whether this proposal requires a constitutional amendment if the Supreme Court reviews the determination of the panel or jury. See the discussion in item e., below, regarding Wis. Const. art. VII, s. 11.]

e. Replace the Supreme Court as the final decision-maker in disciplinary proceedings where a Supreme Court justice is the subject of disciplinary proceedings, or in all disciplinary proceedings. The alternative decision-maker could be the panel or jury in the current disciplinary process or a special tribunal, such as the Government Accountability Board or a panel comprised of circuit court judges and court of appeals judges. [This proposal would likely require a constitutional amendment because Wis. Const. art. VII, s. 11, requires that justices or judges be disciplined by the Supreme Court. In *In re Matter of Judicial Disciplinary Proceedings Against Breitenbach*, 167 Wis. 2d 102, 482 N.W.2d 54 (1992), the Wisconsin Supreme Court reinforced its role in imposing judicial discipline. The court held that the Judicial Commission could not stipulate to the dismissal of a judicial disciplinary proceeding but had to submit a motion to dismiss to the panel comprised of court of appeals judges, which then would make a recommendation to the Supreme Court regarding the motion to dismiss. Arguments in favor of this proposal are that it addresses the concern about justices determining the discipline of another justice or judge and avoids the possibility of an equally divided Supreme Court. Arguments against this proposal are that the Supreme Court is best positioned as the head of the judiciary to impose discipline on justices and judges and that the current system of judicial discipline works.]

f. Create separate procedures for the discipline of Supreme Court justices, court of appeals judges, and circuit court judges. [This proposal provides for separate procedures for each type of justice or judge, allowing the Special Committee to consider the differences between Supreme Court justices, court of appeals judges, and circuit court judges.]

An Equally Divided Supreme Court

1. Background

In *In the Matter of Judicial Disciplinary Proceedings Against Gableman*, the Supreme Court was equally divided. Chief Justice Abrahamson and Justices Bradley and Crooks jointly issued a decision, and Justices Prosser, Roggensack, and Ziegler jointly issued a decision. The decisions provided different opinions about the next step in disciplinary proceedings if the Supreme Court is equally divided.

Chief Justice Abrahamson and Justices Bradley and Crooks stated that a majority did not accept or reject the panel recommendation to grant Justice Gableman's motion for summary judgment, nor did a majority agree on any disposition of the complaint filed by the Judicial Commission or grant Justice Gableman's motion for summary judgment. The opinion asserted that the Judicial Commission's complaint survived and that matter should be remanded to the Judicial Commission with instructions that the Judicial Commission request a jury hearing. [2010 WI 61.]

Justices Prosser, Roggensack, and Ziegler stated that the Supreme Court has original jurisdiction in disciplinary proceedings and that an equally divided court shows that the Judicial Commission did not meet its burden of proof in the case against Justice Gableman. The opinion maintained that the court anticipated a motion to dismiss the Judicial Commission's complaint. [2010 WI 62.]

2. Alternatives

The Special Committee could propose to:

a. Provide that a Judicial Commission complaint survives if a Supreme Court decision on discipline is evenly divided. Further, require that the Judicial Commission use a jury hearing if the Supreme Court decision is evenly divided and a panel hearing was previously used, and require that the Judicial Commission use a panel hearing if the Supreme Court decision is evenly divided and a jury hearing was previously used. [This proposal would adopt the decision of Chief Justice Abrahamson and Justices Bradley and Crooks in *In the Matter of Judicial Disciplinary Proceedings Against Gableman.* Arguments in favor of this proposal are that it clarifies what the next step is following the impasse of an evenly divided Supreme Court and that it allows the disciplinary proceedings to continue. An argument against this proposal is that, as James Alexander, the Executive Director of the Judicial Commission, testified, if the Judicial Commission wishes to proceed with a jury hearing after an equally divided Supreme Court decision, it currently has the authority to dismiss a case and begin the judicial discipline process again and request a jury hearing.]

b. Provide that the Judicial Commission's complaint is dismissed if the Supreme Court decision on discipline is evenly divided. [This proposal would adopt the decision of Justices Prosser, Roggensack, and Ziegler in *In the Matter of Judicial Disciplinary Proceedings Against Gableman.* Arguments in favor of this proposal are that it clarifies what the next step is following the impasse of an evenly divided Supreme Court decision and creates finality for the disciplinary proceedings.]

c. Provide that if the Supreme Court decision on judicial discipline is evenly divided, the panel's or jury's recommendation is binding. [This proposal gives the panel or jury the authority to impose discipline if the Supreme Court decision is evenly divided. It is not clear whether this proposal requires a constitutional amendment if the Supreme Court does not impose discipline. See the discussion above regarding Wis. Const. art. VII, s. 11.]

Avoiding an Equally Divided Supreme Court and Ensuring a Quorum

1. Background

A Supreme Court justice who is the subject of disciplinary proceedings does not take part in the Supreme Court's consideration of the justice's discipline, resulting in no more than six members of the Supreme Court considering discipline. An even number of justices may result in an evenly divided court. Further, if any justices recuse themselves, it is possible that the number of remaining justices may be less than four, which would not constitute a quorum of the court. [Wis. Const. art. VII, s. 4.] In addition, it appears that the state constitution may prohibit the temporary appointment of a court of appeals judge or circuit court judge to the Supreme Court. [Wis. Const. art. VII, ss. 4 (3) and 24 (3).]

The Special Committee might consider how to avoid having an even number of Supreme Court justices considering discipline and what happens if the number of participating justices is less than a quorum.

2. Alternatives

The Special Committee could propose to:

a. If a Supreme Court justice is the subject of disciplinary proceedings, require that the justice, and any other justice who recuses himself or herself, be replaced with a court of appeals judge or circuit court judge to provide an odd number of justices and to provide a quorum. [This proposal would likely require a constitutional amendment because the state constitution appears to prohibit the temporary appointment of a court of appeals judge or circuit court judge to the Supreme Court.]

b. If a Supreme Court justice is the subject of disciplinary proceedings and an even number of justices remain to consider discipline, require that another justice be removed, by lot, to provide an odd number of justices. [This proposal provides for an odd number of justices by removing an additional justice from an even-numbered court. However, it may be argued that the removal of a justice impedes the right to vote of those who elected the justice.]

c. Request that the Supreme Court adopt a procedure, by rule, to ensure an odd number of votes on judicial discipline cases. [This proposal requests that the Supreme Court take certain action but does not require such action. Presumably, the Supreme Court would adopt a procedure under its superintending authority in Wis. Const. art. VII, s. 3. Depending on the procedure adopted by the court, the issues described in items a. and b., above, may arise.]

d. Request that the Supreme Court provide for a panel of circuit court judges or court of appeals judges to review discipline of a justice. [This proposal requests that the Supreme Court take certain action but does not require such action. Presumably, the Supreme Court would adopt a procedure under its superintending authority in Wis. Const. art. VII, s. 3. Depending on the procedure adopted by the court, this proposal may require a constitutional amendment because Wis. Const. art. VII, s. 11, requires that justices or judges be disciplined by the Supreme Court and that the Legislature establish procedures for judicial discipline.]

Judicial Commission Confidentiality

1. Background

Prior to the filing of a complaint with the Supreme Court, disciplinary proceedings are confidential unless the judge being investigated waives the right to confidentiality in writing to the Judicial Commission. A person who provides information to the Judicial Commission relating to alleged misconduct may request that the Judicial Commission not disclose his or her identity to the judge prior to filing a complaint. [s. 757.93 (1), Stats.]

However, prior to filing a complaint, if an investigation becomes known to the public, the Judicial Commission may issue statements to correct public misinformation; clarify procedural aspects of the proceedings; explain the right of the judge to a fair hearing; confirm the pendency of an investigation; state that the judge denies the allegations; or state that an investigation is completed and that no probable cause was found. The complaint filed with the Supreme Court and all subsequent hearings are public. [s. 757.93 (2) and (3), Stats.]

2. Alternatives

The Special Committee could propose to:

a. Provide that all steps in disciplinary proceedings are not confidential. [This proposal would provide transparency throughout the judicial discipline process, including transparency in inquiries that the Judicial Commission determines are frivolous or unfounded. In some cases, the justice or judge who is the subject of a frivolous or unfounded inquiry is not notified of the inquiry, so this proposal might also include a requirement that a justice or judge be notified of any inquiry.]

b. Provide that disciplinary proceedings are not confidential if they become known to the public. [If an investigation becomes known to the public, the Judicial Commission may provide certain information about the proceedings under current law. This proposal would provide transparency for disciplinary proceedings that become known to the public and would allow for more participation by interested parties, possibly through the submission of amicus briefs. However, under this proposal, disciplinary proceedings that become known to the public would be treated substantially differently than proceedings that are not known to the public.]

c. Provide that disciplinary proceedings are not confidential once an investigation is authorized by the Judicial Commission. [An argument in favor of this proposal is that it would make interested parties aware of the disciplinary proceedings earlier in the judicial discipline process.]

d. Allow public input in the investigation stage for investigations that become known to the public. [This proposal maintains confidentiality requirements, but allows interested parties to participate if disciplinary proceedings become known to the public.]

RECUSAL

An Objective Standard of Impartiality for Purposes of Judicial Disqualification

1. Background

Section 759.19 (2), Stats., provides that a judge must disqualify himself or herself from any civil or criminal action or proceeding if certain factual circumstances can be proven. In addition, the statute requires disqualification when a judge subjectively determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner. When a judge's refusal to disqualify himself or herself under this subjective standard is made, the only question before a reviewing court is whether the record shows that the judge made this determination; there is no further investigation of the judge's thought process and no consideration of what a reasonable person might believe. In contrast, s. SCR 60.04 (4) of the Code of Judicial Conduct, in part, requires a judge to recuse himself or herself 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 court analyzing an issue of judicial disqualification or recusal under the Due Process Clause will employ, in part, an objective standard to determine whether a judge can act impartially. Similarly, 28 U.S.C. s. 455 provides that a federal judicial official must disqualify himself or herself in any proceeding in which the official's impartiality must reasonably be questioned. According to the

American Bar Association, 45 states make use of the federal statutory standard and an additional three states use similar language.

2. Alternatives

The Special Committee could propose to:

a. Retain the current system under which a judge failing to recuse himself or herself under an objective standard of impartiality may face future discipline, but will not be required to disqualify himself or herself under s. 757.19, Stats.

b. Amend s. 757.19 (2), Stats., to include a provision requiring a judge to disqualify himself or herself when his or her impartiality might reasonably be questioned by others. [An argument in favor of this proposal is that it is broad enough to encompass an objective totality of the circumstances test. That is, rather than attempt to describe every situation imaginable that argues for or against impartiality (for example, the public remarks of a judicial candidate regarding the legal system or regarding an opponent's activities within the legal system), a judge or a reviewing entity will make an assessment of impartiality on the factual situation that uniquely presents itself in any given situation. The contrary position, of course, is that if the Legislature is aware of a form of impartiality that it would like to prevent, it should specify its intent in direct and clear statutory language.]

Campaign Contributions Made to a Judge and Independent Communications Made About a Judge

1. Background

Section SCR 60.04 (7) and (8) provides that a judge is not required to recuse himself or herself based solely on either of the following:

a. A judge's campaign committee request of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in a proceeding.

b. The sponsorship of an independent expenditure or issue advocacy communication by an individual or entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

Section SCR 60.06 (4) provides that a judge's campaign committee may solicit and accept lawful campaign contributions from individuals or entities even though the contributor may be involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate.

Wisconsin's campaign finance law provides that neither an individual nor a committee may contribute more than the following amounts to a person seeking the seat of a justice or a judge:

a. $1,000 to a candidate for justice.

b. $3,000 to a candidate for court of appeals judge in a district containing a county having a population of more than 500,000.

c. $2,500 to a candidate for a court of appeals judge in a district not containing a county having a population of more than 500,000.

d. $3,000 to a candidate for circuit judge in a circuit having a population of more than 300,000.

e. $1,000 to a candidate for circuit judge in a circuit not having a population of more than 300,000.

[s. 11.26 (1) (am), (cc), (cg), (cn), and (cw) and (2) (an), (cc), (cg), (cn), and (cw), Stats.]

In her testimony presented to the Special Committee, Justice Ann Walsh Bradley asserted that past practice has required that a judicial campaign committee may not knowingly solicit or accept contributions from a litigant with a case pending in front of the judge represented by the judicial campaign committee.

2. Alternatives

The Special Committee could propose to:

a. Amend the campaign finance law to prohibit a judicial campaign committee, during a civil or criminal action or proceeding, from knowingly soliciting a campaign contribution from a party; from a person connected to the party such as an officer, director, or family member of the party; or from the party's attorney or a member of the attorney's law firm. [The argument for this alternative is that it would prevent an apparent conflict of interest in an ongoing case and that it would prevent a judicial campaign committee from pressuring parties and attorneys to make campaign contributions. Arguments against the proposal include the following: (1) the prohibition would put an undue burden on judges and justices, and especially circuit court judges, to be aware of all of the parties and attorneys appearing in their courts and transmitting this information to their judicial campaign committees; (2) the prohibition may encourage close participation of a judge or justice in the activities of the judicial campaign committee contrary to the apparently desired separation of judges and their campaign committees in s. SCR 60.06 (4); and (3) the prohibition places a burden on the judicial campaign committee of a sitting judge or justice that is not imposed on the challenger.]

b. Amend the campaign finance law to provide that a party, a person connected to the party, or an attorney representing a party or the attorney's law firm must notify an opposing party and the court when a campaign contribution is made during a pending civil or criminal action or proceeding. [An argument in favor of this proposal is that no burden is placed on a judge or justice to keep track of parties and litigants and to coordinate the solicitation efforts of their judicial campaign committees. An additional argument in favor of the proposal is that there is no outright limitation on the political free speech interest of anyone; instead, when a court and an opposing party are notified of a campaign contribution during a civil or criminal action or proceeding, questions of disqualification and recusal can be raised as the situation merits. An argument against the proposal is that it creates a new complexity for parties and attorneys to take into account during a civil or criminal action or proceeding.]

c. Amend s. 757.19, Stats., to provide that a judge must disqualify himself or herself: (1) when the judge's campaign committee has received more than a stated amount of campaign contributions from persons affiliated with a party or the party's attorney, including the party or attorney, in a pending civil or criminal action or proceeding or from a person having a direct or indirect interest in the proceeding; or (2) when independent expenditures or communications, in excess of a stated amount, are made by a person to favorably influence a judge's election. [An argument in favor of this proposal is that excessive amounts of campaign contributions or independent expenditures or communications may, under an objective standard, automatically place a judge's impartiality in question. An additional argument in favor of the proposal is that the provision in the Code of Judicial Conduct providing that a judge need not recuse himself or herself based solely on independent expenditures or communications is contrary to the *Caperton* decision, which appeared to find a due process requirement to recuse oneself on the basis of excessive independent activity. An argument against the proposal is that judges are elected in this state, campaign contributions are an accepted practice and encouraged, and the contributions under ch. 11, Stats., are minimal and, therefore, campaign contributions should not force a disqualification. Additional arguments against the proposal are that: (1) requiring disqualification in these circumstances would deny the First Amendment rights of the candidate's supporters; (2) *Caperton* was not decided merely on the basis of the amount of money spent, but also on a number of other extreme factors; and (3) the language of s. SCR 60.04 (7) and (8) should be incorporated into s. 757.19, Stats. Finally, the proposal may be criticized on the basis that it does not provide a look-back period; that is, does the proposal apply only to the latest election cycle or to all of a particular judge's election activity?]

d. Amend s. 757.19, Stats., to provide that a judge must disqualify himself or herself when financial support of the type described in item c., above, causes the judge to conclude that his or her impartiality might reasonably be questioned by others. In making this determination the judge must consider: (1) the total amount of financial support provided by party, the party's attorney, or another person relative to the total amount of the financial support for the judge's election; (2) the timing between the financial support and the commencement of a civil or criminal action or proceeding; and (3) any additional circumstances. [This alternative is derived from an amendment to the Code of Judicial Conduct adopted by the Supreme Court of Washington on September 9, 2010. The arguments for and against this proposal are similar to those discussed in item c., above. The look-back period in the Washington rule is six years.]

Review of Decision of a Judge to Refuse to Disqualify Himself or Herself

1. Background

Under current law, it appears that a motion seeking the disqualification of a judge or a justice may occur at any time in a proceeding. [However, with respect to a disqualification motion against a justice, the Wisconsin Supreme Court has said that, since disqualification motions are an attack on the integrity of the court's decisions, they must be brought promptly. *Jackson vs. Benson*, 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545.] The denial of a disqualification motion is subject to review upon appeal, but there appears to be no procedure for expedited review and the question of whether the

Supreme Court as a whole may review a single justice's denial of a disqualification motion has not been decided.

2. Alternatives

The Special Committee could propose to:

a. Create a method by which a denial of a disqualification motion by a circuit court judge or a court of appeals judge is reviewed in an expedited period by the chief judge of a local district or by a chief appellate court judge, respectively. This review could be final. [The argument in favor of this proposal is that independent review that is speedy and determinative would put an end to lingering concerns over impartiality, at least within a particular judicial proceeding. The argument against the proposal is that it would add a new burden to the responsibilities of chief judges without knowing how extensive that burden might be. An additional argument against the proposal is that it would remove the Supreme Court from making precedential, policy-making decisions in this area of the law.]

b. Designate a body to give an advisory opinion to a judge who is the subject of a disqualification motion. [An argument in favor of an advisory body is that it may be distanced from the judicial system and have the appearance of greater objectivity. An argument against the proposal is that it creates a new bureaucracy and might have little impact on the ultimate review of decisions to deny disqualification motions.]

c. Require that a denial of a motion to disqualify be reviewed on a de novo basis rather than under the abuse of discretion standard. [An argument in favor of this proposal is that the standard of abuse of discretion is a relatively easy standard for a judge to meet; de novo review allows for an independent decision by an appellate court. An argument against the proposal is that review of these decisions might become more time consuming.]

d. Amend s. 757.19, Stats., to provide that the Supreme Court may review a justice's denial of a disqualification motion. [An argument in favor of this proposal is that it will clarify the role of the Supreme Court when a disqualification motion is made with respect to one or more justices. An additional argument in favor of the proposal is that since a circuit court judge's and a court of appeals judge's denials are subject to some sort of review, a justice's denial also should be reviewable. An argument against the proposal is that, while the Legislature may share general constitutional authority with the judicial branch in the area of recusal, instructing the court on its jurisdiction to manage its internal affairs may raise a separation of powers question; a constitutional amendment would ensure the authority of the full court to review a justice's denial of a disqualification motion. With respect to how an evenly divided Supreme Court should review the denial of a disqualification motion by a single justice, see the discussion of avoiding an equally divided Supreme Court and ensuring a quorum, beginning on p. 4 of this Memo.

Statement of Reasons for Disqualification or Nondisqualification

1. Background

Section 757.19 (5), Stats., provides that when a judge is disqualified, the judge must file in writing the reasons for the disqualification.

2. Alternative

The statutes could be amended to provide that a judge must also file in writing the reasons for denying a disqualification motion. [An argument in favor of this proposal is that the judicial branch could maintain useful statistics about disqualification motions and further develop the law regarding disqualification and recusal.]

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