



WISCONSIN LEGISLATIVE COUNCIL

JUDICIAL DISCIPLINE AND RECUSAL

Room 328 Northwest
State Capitol

October 14, 2010
1:00 p.m. – 3:30 p.m.

[The following is a summary of the October 14, 2010 meeting of the Special Committee on Judicial Discipline and Recusal. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc>.]

Call to Order and Roll Call

Chair Hebl called the committee to order. The roll was called and it was determined that a quorum was present.

COMMITTEE MEMBERS PRESENT: Rep. Gary Hebl, Chair; Sen. Glenn Grothman, Vice-Chair; Rep. Frederick Kessler; and Public Members Troy Cross, Judge Mac Davis, Diane Diel, Andrea Kaminski, Lynn Laufenberg, and David Schultz.

COMMITTEE MEMBERS EXCUSED: Rep. Daniel LeMahieu; and Public Members Thomas Basting and Stephen Hurley.

COUNCIL STAFF PRESENT: Ronald Sklansky and Don Salm, Senior Staff Attorneys; and Jessica Karls-Ruplinger, Staff Attorney.

APPEARANCES: Andrew Cook, Wisconsin Civil Justice Council; Melanie G. Ramey, President, League of Women Voters of Wisconsin; and John Robinson, State Director, Justice at Stake.

Approval of the Minutes of the September 16, 2010 Meeting

Mr. Schultz stated that the following sentence in the summary of Chief Justice Abrahamson's remarks, appearing on page 5 of the minutes, is unclear: "The procedures for judicial discipline under the code, created by the Legislature, are the same as those required for discipline; they overlap."

Staff proposed to replace this sentence with language derived from Chief Justice Abrahamson's written submission. The new language would read: "The procedures the Legislature created for judicial discipline apply to a judge's failure to recuse himself or herself as required by the Code of Judicial Conduct. This is where discipline and recusal overlap."

Chair Hebl asked for unanimous consent for approval of the minutes, as amended. The motion carried by a voice vote.

Public Hearing

Melanie Ramey; League of Women Voters of Wisconsin

Ms. Ramey stated that the judiciary is an old institution and that the public must have confidence in its fairness and integrity. This confidence can be shaken by wrongful convictions and, in the Wisconsin Supreme Court, by continuing 4-3 votes on controversial matters. She noted that the public has a negative view of some courts and their decision-making processes. Ms. Ramey stated that a judge must have two main qualifications: competency and integrity. Excess campaign expenditures challenge the public's perception of a judge's integrity. With respect to the issue of judicial discipline and recusal, Ms. Ramey stated that the statutes should be amended to provide all of the following:

1. The inclusion of an objective standard to determine the impartiality of a judge when a motion for disqualification is made.
2. An expedited review of a judge's denial of a disqualification motion by another impartial entity.
3. Greater transparency in the process of judicial discipline.
4. A requirement that a judge's reasons for denying a disqualification motion be placed in the record in writing.

Andrew Cook; Wisconsin Civil Justice Council, Inc.

Mr. Cook began his presentation by commenting on the speed with which the study committee is moving. Following two committee meetings involving invited speakers, Mr. Cook noted that the staff had prepared an options memo. However, he stated that the Special Committee was holding its third meeting only four business days after making the options memo public, giving interested parties an insufficient amount of time to digest and comment on the options memo.

Mr. Cook stated that the Wisconsin Civil Justice Council (WCJC) recommends that the Special Committee take no action regarding judicial disqualification or recusal and instead allow the recent amendments to the Code of Judicial Conduct, made by the Wisconsin Supreme Court, to remain in place. Mr. Cook stated that the public supports the Wisconsin system of judicial election; that elections assure judicial accountability; and that more campaign spending leads to a better informed electorate and a higher voter turnout. Thus, Mr. Cook stated that the Legislature should be careful not to overly restrict spending in judicial elections.

Mr. Cook noted that a new public financing system for Wisconsin Supreme Court races was enacted in the 2009 Session of the Legislature. He stated that based on the new \$1,000 campaign

contribution limitation to Supreme Court Justices, the concern of undue influence over judicial campaigns through campaign contributions has all but been eliminated. In addition, he noted that the ability of a justice to receive additional grants to meet opponents' expenditures is an additional reason to state that proposed legislative options in this area are unnecessary.

In response to questions, Mr. Cook stated that WCJC has no objection to placing an objective standard in s. 757.19, Stats.; that WCJC has taken no position on requiring a judge to place his or her reasons for denial of a disqualification motion in writing; and that the Code of Judicial Conduct appropriately accounts for independent expenditures in judicial elections.

Regarding the timing of the options memo, Chair Hebl noted that the Memo's contents merely reflected past testimony that had been in the public domain for two months.

John Robinson; Justice at Stake

Mr. Robinson noted that the Justice at Stake campaign is a part of a national coalition of concerned civic and legal leaders promoting substantive and procedural reforms and that his testimony did not necessarily reflect the positions of all Justice at Stake partner organizations or board members.

Mr. Robinson stated that in view of the increasing campaign expenditures regarding Supreme Court candidates, and following the U.S. Supreme Court opinion in *Caperton*, Justice at Stake has been urging states to adopt recusal reforms. According to Mr. Robinson, new recusal standards will reassure citizens that the courts will be fair and impartial and increase public trust.

Mr. Robinson stated that Justice at Stake recommends the following amendments to Wisconsin law:

1. The adoption of an objective standard of impartiality for analyzing a motion to disqualify a judge. Adoption of an objective standard would comport with the rules of 48 other states and the American Bar Associations' model recusal provisions.
2. Requiring a judge to submit written reasons for denying a disqualification motion and providing a prompt, de novo review of such a decision. Written decisions require a judge to fully analyze a situation and provide transparency to the process. De novo review provides more impartiality to the process.
3. Requiring a judge to recuse himself or herself when campaign support has exceeded a stated amount. While no specific number was provided, Mr. Robinson stated that polling reveals that the public questions judicial integrity when excessive campaign amounts have been spent.

Mr. Robinson concluded by stating that disqualification and recusal rules do not infringe upon the right to vote for judges. He stated that there is no constitutional right to have a judge of one's choice in a specific case. He further stated that the Constitution requires due process in judicial proceedings and that due process is threatened when a judge hears a case involving major campaign contributors and refuses to disqualify himself or herself when the judge's impartiality might reasonably be questioned.

In response to questions, Mr. Robinson stated that his testimony primarily concerned the appearance of impartiality; that the right of substitution of a judge is important but does not entirely

solve the problem of judicial impartiality; and that he did not know how many other states require a judge to submit written reasons for denying a disqualification motion.

Discussion of Committee Assignment

Before the staff reviewed Memo No. 7, relating to legislative options regarding judicial discipline and recusal, Representative Kessler stated that the jurisdiction of the Judicial Commission and the Office of Lawyer Regulation, with respect to judicial activities, needs to be clarified. Judge Davis stated that an additional factor in reviewing judicial conduct is the applicability of the State Ethics Code to judges. Mr. Cross suggested that the Special Committee could consider providing that the Office of Lawyer Regulation could take up a complaint regarding a judge's law license only after the Judicial Commission concluded any proceedings that may have been initiated there. James Alexander, the Executive Director of the Wisconsin Judicial Commission, who attended the meeting, stated that there has been no jurisdictional conflict between the Judicial Commission and the Office of Lawyer Regulation.

Judicial Discipline

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

Staff reviewed the options for altering the decision-makers in the disciplinary process engaged in by the Judicial Commission. Because there had been little testimony noting specific problems with the Judicial Commission process and because providing a new decision-maker in a disciplinary proceeding against a Supreme Court Justice would probably require a constitutional amendment, the Special Committee did not move forward with any of the alternatives presented by the staff. However, Representative Kessler asked staff to consider a constitutional amendment providing for a panel of three senior appellate court judges to be the final arbiter in a disciplinary proceeding against a justice.

An Equally Divided Supreme Court

Staff explained that, because of the unclarity of a Judicial Commission proceeding that ends in a tie vote in the Wisconsin Supreme Court, the following options could be considered:

1. Provide that a Judicial Commission complaint survives for further action before a panel or a jury.
2. Provide that the Judicial Commission's complaint is dismissed.
3. Provide that the panel's or jury's recommendations in the proceeding is binding.

While no consensus among the members of the Special Committee was evident for any of the alternatives, there appeared to be a majority interest in reviewing draft legislation that will make the panel's or jury's recommendation binding in a Judicial Commission proceeding that results in an equally divided Supreme Court.

Avoiding an Equally Divided Supreme Court and Ensuring a Quorum

Staff explained that the options to avoid an equally divided Supreme Court center around replacing one or more justices with a court of appeals judge or a circuit court judge or removing a

justice, possibly by lot, to provide an odd-number of justices. Many of the alternatives presented would probably require a constitutional amendment.

Representative Kessler suggested that a constitutional amendment could be prepared to allow court of appeals judges to replace members of the Supreme Court who have recused themselves from any Judicial Commission proceeding. According to Representative Kessler, the proposal would provide that the selection of court of appeals judges would be based on the seniority and availability of the appellate court judges. [Representative Kessler also proposed a similar constitutional amendment for purposes of reviewing a panel or jury recommendation in a Judicial Commission disciplinary process involving a Supreme Court Justice.]

There appeared to be an interest among some of the members of the Special Committee in reviewing a draft to propose a constitutional amendment regarding the replacement of a justice by a court of appeals judge in the case of a Supreme Court review of a Judicial Commission proceeding and in reviewing a draft to propose a constitutional amendment regarding the replacement of the Supreme Court with a panel of court of appeals judges in a Judicial Commission disciplinary process involving a Supreme Court Justice.

Judicial Commission Confidentiality

Staff explained a number of options regarding greater public participation in the Judicial Commission process. The members of the Special Committee expressed little interest in pursuing this issue.

An Objective Standard of Impartiality for Purposes of Judicial Disqualification

Staff explained that the Special Committee was created in part due to the request from Supreme Court Justice N. Patrick Crooks to the Joint Legislative Council for the creation of a study committee to consider whether the statutes should be amended to incorporate an objective standard of impartiality for purposes of reviewing a disqualification motion. The options presented to the committee were to either retain the current law or to 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.

Mr. Cross suggested additional refinements to s. 757.19, Stats., including defining the terms “the third degree of kinship” and “significant financial or personal interest.”

Again, while there appeared to be no consensus among the members to propose an amendment to s. 757.19 (2), Stats., there appeared to be a majority sentiment in reviewing a draft of legislation that incorporates an objective standard into the statutes.

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

Staff described the following options regarding campaign contributions made to a judge and independent communications made about a judge:

1. Amend the campaign finance law to prohibit a judicial campaign, during a civil or criminal action or proceeding, from knowingly soliciting a campaign contribution from specified parties.

2. Amend the campaign finance law to provide that specified parties or representatives must notify an opposing party and the court when a campaign contribution is made during a pending civil or criminal action or proceeding.
3. Amend the statutes to provide that a judge must disqualify himself or herself when a judge's campaign committee has received more than a stated amount of campaign contributions from specified parties or when independent expenditures or communications, in excess of a stated amount, are made by a person to favorably influence a judge's election.
4. Amend the statutes to provide that a judge must disqualify himself or herself when electoral financial support causes the judge to conclude that his or her impartiality might reasonably be questioned by others, making use of a totality of circumstances test.

Judge Davis questioned the advisability of expanding the grounds for judicial disqualification when a number of counties in Wisconsin have only one judge and when the amount of campaign contributions and some independent expenditures already are public information. Mr. Laufenberg, Ms. Diel, Ms. Kaminski, and Representative Kessler expressed support for the last option described in this section along with a provision that would allow the parties to an action to waive disqualification. Members of the committee also expressed interest in the second option presented in this section. Chair Hebl asked staff to draft proposals based on these alternatives for the consideration of the Special Committee.

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

Staff described the following alternatives providing for the review of a decision of a judge to refuse to disqualify himself or herself:

1. 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 a chief judge of a local district or by a chief appellate judge, respectively. The review could be final.
2. Designate a body to give an advisory opinion to a judge who is the subject of a disqualification motion.
3. Require that a denial of a motion to disqualify be reviewed on a de novo basis rather than under the abuse of discretion standard.
4. Amend the statutes to provide that the Supreme Court may review a justice's denial of a disqualification motion.

The members of the Special Committee expressed little interest in altering the current method of review of the denial of a disqualification motion by a circuit court judge or a court of appeals judge. There was interest in amending the statutes to clarify that the Supreme Court may review a justice's denial of a disqualification motion. Chair Hebl asked staff to prepare a draft to clarify the statutes in this manner. Judge Davis emphasized that if the Legislature is dissatisfied with a particular justice, impeachment proceedings may be commenced.

Statement of Reasons for Disqualification or Nondisqualification

Staff explained that the statutes could be amended to provide that a judge must file in writing the reasons for denying a disqualification motion, as well as when a motion is granted as required under current law. Chair Hebl asked that this proposal be drafted for the consideration of the Special Committee.

Other Business

The committee will meet again on ***Thursday, November 18, 2010, at 10:00 a.m., in Room 328 Northwest, State Capitol, Madison.***

Adjournment

The meeting was adjourned at 3:30 p.m.

RS:ty