State of Wisconsin \ JUDICIAL COUNCIL
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DATE: June 27, 1990

TO: Members of the Supreme Court

FROM: Judicial Council

At the request of the Judicial Commission (copy attached), the Judicial Council has studied issues relating to discipline and disability of members of the Supreme Court. Under the present law, any matter brought by the Judicial Commission involving a member of the Court would presumably be handled like any such action involving any state judge.

The Council and its subcommittee focused on two possible substantive problems that have arisen in other states. The first involves discipline of a member of the Supreme Court. In Minnesota, for example, a Supreme Court justice was the subject of a disciplinary action when he was accused of cheating on the multi-state bar exam. The second involves disability. Apparently, several jurisdictions have experienced difficulties when a member of the highest court was disabled by a stroke or some other physical impairment.

Under the present law in Wisconsin, an action relating to these issues involving a member of the Court would be decided by the Court, after it was processed like any similar issue involving a judge of a lower court. There are possible problems with this. One is the absence of a quorum in the event four justices recuse themselves. In Minnesota, the whole court recused itself and a panel comprised of members of the Court of Appeals sat as the Supreme Court. This matter was resolved when the justice subject to the action resigned from the Supreme Court.

Another possible problem is the appearance of impropriety when members of the Court are called upon to sit in judgment of a colleague. This, in part, prompted the Minnesota Supreme Court to put into rule its action in the case already mentioned.

Of course, the rule of necessity might be invoked in Wisconsin to deal with a quorum problem. The Court could then designate "replacement" judges to sit on the court to make a quorum. Concern about the appearance of impropriety might not be well founded in light of the Court's history, reputation and responsibilities. After all, the Court is called upon to decide the most difficult cases as a matter of course. Nevertheless, public perceptions of impropriety, however ill-founded, cannot be ignored.

The Judicial Council has studied these issues with care, particularly in the light of the Wisconsin Constitution's limits on who may sit on the Supreme Court. In so doing, the Council committee considered proposing a constitutional amendment. One such amendment would allow the Chief Justice to designate another judge to sit in place of any justice who was disqualified or who recused himself or herself in a disciplinary proceeding against a Supreme Court justice. The committee also considered a rule or statute that would set forth a special procedure when a member of the Supreme Court was the subject of discipline or possible removal due to a disability. One proposal would have required a jury trial in all contested cases. The Council also considered making no recommendation, which would allow the Court to handle such an issue, if and when it arose, as a case of first impression. However, this might prove difficult in the middle of a controversy involving a member of the Court.

The Council, after determining how other states have handled these issues and after considering many options, decided to raise these matters with the

Court. In our view, the Court is best able to deal with these matters and at a time when no such issue is before it.

If the Court wishes the Judicial Council's assistance with the drafting of a rule, the Council will be glad to provide it.

Such a rule might, for example, provide:

(1) that the ordinary procedures (starting with the Judicial Commission) applicable in other cases would be followed;

(2) that such matters remain the ultimate responsibility of the Court;

(3) that when the Court lacks a quorum, the issue would be handled in the way designated by the rule.

In the event a quorum was lacking, justices might be designated, assuming the rule of necessity applies, by lot from among all judges (circuit and appeals court) in the state to avoid any appearance of impropriety.

As noted, Minnesota adopted Rule 13(h), which is attached in the letter of Richard Aretz to Walter J. Dickey. We do also note that, unlike Wisconsin, the Minnesota Constitution provides an explicit mechanism for the replacement of justices who disqualify themselves.

In addition to the attachments already noted, there is also attached a list of the members of the Judicial Council committee which studied these issues and the minutes of its meetings.

Respectfully submitted,

JUDICIAL COUNCIL

James L. Fullin, Jr.
Executive Secretary

Enclosures

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JUDICIAL COMMISSION
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Elena A. Cappella
Executive Director
Phone: 608-266-7637

September 22, 1988

Honorable Thomas S. Williams
Chair, Judicial Council
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Dear Judge Williams:

As we discussed last month, the Judicial Commission has asked me to refer the following matter to the attention of the Judicial Council.

Under Wisconsin's judicial conduct system, formal disciplinary and disability cases are filed in and decided by the Supreme Court. (See Wis. Const., art. VII, § 11; §§ 757.81-757.99, Stats.) This is so even if the respondent in the case is a justice of the Supreme Court. While the Commission does not anticipate ever having to initiate such a proceeding, we are aware that a member of the highest court in a growing number of states (including California, Florida, Minnesota, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont and West Virginia) has been the subject of an investigation by the judicial conduct organization, leading in some cases to the imposition of discipline. The Judicial Commission is concerned that current procedures would not adequately insure public confidence in the fairness and impartiality of such a proceeding in this state.

The problem in a nutshell is this. The Wisconsin Constitution seems to preclude temporary appointments to the Supreme Court. (See Wis. Const., art. VII, §§ 4(3), 24(3).) Thus, when a Supreme Court justice is unable to hear a matter for whatever reason, it is heard by the remaining justices only. Ordinarily, this creates no serious problem (other than the possibility of an equally divided court). A disciplinary proceeding against a justice, however, would present a unique problem in at least two respects. Clearly, the respondent-justice would be mandatorily disqualified, but so too may several colleagues -- because they may, for example, possess extrajudicial knowledge of relevant facts, be called as witnesses, be confidants of the respondent, or harbor a predisposition in the matter. More importantly, however, even if sufficient members of the Court remained available to sit on it, a disciplinary or disability case decided by the respondent's immediate judicial colleagues would be viewed with understandable suspicion by a public already skeptical that its interests can ever be adequately protected by self-regulation by a profession.

The Commission has not researched what procedures govern formal disciplinary proceedings in other states when a judge of the highest court is involved. (The Center for Judicial Conduct Organizations, a service of the American Judicature Society, may have this information; Jeffrey M. Shaman, the director of the Center, can be reached at 25 East Washington, Suite 1600, Chicago, IL 60602, or telephone 312-558-6900.) We know that in some states, the entire Supreme Court stepped down and an ad hoc Supreme Court was appointed to hear the case. (See enclosed newspaper article.) This seems a reasonable approach, but one apparently foreclosed by our constitution.

The Commission requests that the Judicial Council undertake a study of this problem and propose whatever legislation may be necessary to resolve it.

Thank you for your consideration of our request. If you have any questions, please do not hesitate to call.

Very truly yours,

Elena A. Cappella

Elena A. Cappella
Executive Director

ew

enclosure

cc James L. Fullin, Jr.
Executive Secretary
Judicial Council

MINNESOTA BOARD ON JUDICIAL STANDARDS

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[redacted]

Minnesota did not have a Court of Appeals. Our Minnesota Constitution, statutes and rules do, however, explicitly provide a mechanism for members of the new Court of Appeals to constitute an ad hoc Supreme Court by replacement of justices of the Supreme Court who disqualify themselves. Thus, Minn. Stat. § 2.724, subd. 2, as recently amended by Laws 1983, Chapter 247, provides that if any number of justices disqualify themselves, the Supreme Court may temporarily assign a Court of Appeals judge to hear and consider the case in place of the disqualified justices. By this procedural mechanism, the sound public policy adopted in California may be, and hereby is, adopted in Minnesota.

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
SUMMARY OF PRCEEDINGS

Lakeshore Room B
Hyatt Regency Hotel
Milwaukee, Wisconsin

10:20 a.m.
January 19, 1990

CALL TO ORDER AND ROLL CALL
(Agenda Item I)

Chairwoman Soeka called the committee to order and the roll was taken.

COMMITTEE MEMBERS PRESENT: Professor Eva M. Soeka, Chair; Kenneth P. Casey; Judge Vivi L. Dilweg; James D. Jeffries; Bruce Munson; Judge Peter G. Pappas; Professor David E. Schultz.

OTHERS PRESENT: Diane Keleher

DISCUSSION OF COMMITTEE ASSIGNMENT
(Agenda Item II)

Chairwoman Soeka noted that about five years ago, the Wisconsin Supreme Court appointed a committee to review the newly proposed code of judicial conduct. The review process took much longer than expected, but the committee's report was filed about two years ago, and is still under consideration by the Court. As reporter to that study committee, she knows that issues were raised with regard to judges or justices who become disabled due to disease, chemical dependency, etc. If a justice of our Supreme Court should become so disabled, the constitution permits our Supreme Court to suspend or remove that justice. Obviously, a similar situation would be presented if a justice were accused of an ethical violation warranting discipline.

In other states where this has happened, one or more justices (sometimes the entire Supreme Court) have recused themselves to avoid any conflict of interest or appearance thereof. Our constitution does not expressly permit judges to be appointed to temporary service on the Supreme Court, so if such recusals occurred here, there may be few or no justices left to decide the case.

Even if there is no real or perceived conflict of interest, requiring six justices to adjudicate the fate of one of their colleagues might result in a tie vote, or serious impairment of the court's collegial functioning in the conduct of its more routine duties.

The Judicial Commission has asked the Judicial Council to look into this issue and make whatever recommendations seem desirable. The purpose of today's organizational meeting is to think about the scope of our work and about what individuals should be invited to assist us.

Chairwoman Soeka hoped the committee would keep its focus narrow. Many issues related to judicial ethics have been addressed in the proposed revised code. We should stick to the issues of whether the Supreme Court can and should appoint an alternate adjudicative body if the question of discipline or disability of a justice arises. The disability situation is particularly difficult because sometimes people don't realize when they are losing their mental acuity.

Chairwoman Soeka noted that Mr. Fullin had sent some background information to the committee. She distributed an additional paper, prepared by an independent research student at Marquette Law School, showing how various states address this question. Some Supreme Courts have constituted alternate adjudicative bodies when the situation arose, but our constitution doesn't clearly give the Supreme Court power to do that. So, it may be desirable to propose a constitutional amendment.

Mr. Jeffries noted that there was recently a public controversy involving a potential conflict of interest of a Supreme Court justice. One of the issues in that controversy, at least as the media portrayed it, was the confidentiality surrounding the judicial discipline process until a formal complaint is filed by the Judicial Commission. Will this committee be reviewing that question?

Chairwoman Soeka thought this committee should not do so. Although she has no preconceived notion of what the outcome of our study will be, she believes we should concentrate on the narrow issue of who should adjudicate a claim of disability or unethical conduct against a justice. If we stick to that task, we may be able to complete our work by the June meeting and move on to other studies to which the Council is committed. If we move into other areas, we could easily become bogged down.

Judge Pappas presumed that, if we decide a constitutional amendment or legislation is necessary, we will proceed to draft a bill or joint resolution proposing the same. Chairwoman Soeka felt the committee should do that. The Legislature isn't well equipped to deal with recommendations submitted in other formats. If we decide someone other than the court itself should hear the matter, we may want to suggest how such a panel should be appointed. One of the issues is avoiding the appearance of impropriety when a court sits in judgment of one of its own. Fairness and objectivity are important attributes of such a body.

Mr. Munson said we might want to investigate the recent federal legislation dealing with the medical disability of a president. Judge Dilweg vaguely recalled that the president, or the cabinet if the president is unwilling to do so, can transfer power to the vice president if the president becomes disabled. Chairwoman Soeka recalled concern when President Reagan underwent surgical anesthesia about who could make command decisions, even during that brief time. It was her recollection that Vice President Bush was delegated certain powers in that circumstance.

Of course, we are talking about a more permanent kind of impairment here, said Mr. Munson. That's right, said Chairwoman Soeka. There is ample evidence that during his final years, Justice William O. Douglas of the U.S. Supreme Court was mentally incompetent. There didn't seem to be any mechanism for

dealing with that, given the lifetime appointment of federal judges. Even in the Wisconsin Supreme Court, where the justices serve ten-year terms, it is not altogether unlikely that a justice could suffer mental impairment due to a disease, trauma or advancing years.

Mr. Casey presumed we are not talking about disqualification of a justice from sitting on a particular case because of bias or conflict of interest. We are discussing who could suspend or remove the justice for serious breach of ethics or medical incapacity. That's right, said Chairwoman Soeka.

Furthermore, said Professor Schultz, we're really not dealing with the Judicial Commission at all. The problem arises after the Commission finds probable cause to believe that a justice should be removed or otherwise disciplined. The precise issue for us is who should be the adjudicative body. We are not talking about the substantive rules of judicial ethics, or the procedures followed by the Judicial Commission in investigating it. Our sole question is who decides whether the violation or disability has been proved and whether suspension, removal or other action is warranted by the facts of the case.

The committee agreed that Professor Schultz had correctly stated the issue. We are not dealing with what happens if five justices recuse themselves from hearing an appeal because of a potential conflict of interest. That is not what we are focusing on, although the remedy might be a constitutional clause allowing the court to appoint an alternative adjudicative panel whenever a certain number of justices have a conflict, in a disciplinary matter or an appeal. The question is, should the court have express constitutional authority to appoint an alternative tribunal to decide a specific issue within its jurisdiction, said Judge Dilweg. Mr. Jeffries agreed, although we shouldn't prejudge the question of who should appoint the alternate tribunal.

Professor Schultz noted that there have been several cases in which, one justice having recused himself, the opinion below was affirmed on a tie vote. That circumstnace seems tolerable, whereas if five or seven justices recuse themselves, a bigger problem would arise.

Judge Pappas noted that if the procedure applies to both the court's appeal deciding function and its judge or lawyer disciplinary role, the substitute tribunal should probably consist of judges. In the discipline/disability cases, some states allow lay participation in the adjudicative tribunal.

Mr. Casey presumed that the Wisconsin Constitution requires the Supreme Court to make the ultimate decision in disability/ethics charges against judges. Judge Dilweg agreed. Article 7, Section 11 states that each judge is subject to reprimand, censure, suspension, or removal for cause or for disability, by the Supreme Court pursuant to procedures established by the Legislature by law. Before this article was adopted in 1977, the Supreme Court did not have disciplinary control over judges, except through the indirect method of disbarring them from the practice of law. Also, said Professor Schultz, Article 7, Section 4(3) allows the Chief Justice of the Supreme Court to assign any judge of a court of record to aid in the proper disposition of judicial business in any court of record <u>except the Supreme Court</u>. That clause ostensibly prohibits the Court from replacing any justice who recuses himself or herself.

Mr. Munson wondered whether the Supreme Court's power to discipline judges could be delegated by the Court to an ad hoc panel. Judge Dilweg thought that that had in fact occurred in other states. Faced with the prospect of adjudicating charges against a colleague, these supreme courts have created ad hoc panels to adjudicate the matter, despite any clear constitutional authority to do so. Such action does not seem to have been challenged; one wonders who would have standing to do so and what the probabilities of success might be. It doesn't seem to present a federal question.

So, said Mr. Munson, it is not at all clear that a constitutional amendment is necessary. And, said Judge Dilweg, drafting and seeking ratification of such an amendment may be difficult. There may be little consensus on who should adjudicate these matters.

Mr. Munson noted that in the executive branch, delegation of power is commonplace. In fact, the Legislature even delegates rulemaking power to executive branch agencies, subject to certain contraints and review processes. Why shouldn't the Supreme Court be able to do likewise? The committee discussed whether, if the Supreme Court appointed a panel to decide a disability case against a justice, the members of this panel would be considered to be serving on Supreme Court in violation of Article 7, Section 4(3) and Section 24(3), Wisconsin Constitution. If not, would the tribunal have the authority to discipline a justice?

Chairwoman Soeka suggested that these questions could use further research. Another issue we should touch on today is that of ad hoc members. Traditionally, Judicial Council committees include not only members of the Council, but others with interest or expertise in the area under study.

Judge Dilweg suggested that Judge Frank Crivello, a member of the Judicial Commission, has excellent credentials for serving on this committee.

Mr. Jeffries noted that the Commission's executive director, Elena Cappella, recommends Professor Joel Grossman of the University of Wisconsin Political Science Department, a former member of the Judicial Commission. Mr. Jeffries does not know Professor Grossman, but feels that someone with a political science background could add a useful perspective to our deliberations.

Professor Schultz wondered who had drafted the language of the legislative joint resolution which was ultimately adopted as Article 7 of the Wisconsin Constitution. Mr. Casey suggested that it might have been Jeffrey Bartell, staff director for the Citizens Study Committee on Judicial Organization appointed by Governor Lucey in the early '70s. Professor Schultz volunteered to research the matter.

Judge Pappas suggested that Jack Dewitt might make an excellent ad hoc member of this committee. Chairwoman Soeka seconded that suggestion. He served on the committee which studied the new code of ethics, so he is very familiar with issues of this type.

Professor Schultz suggested that the State Bar be invited to nominate someone, particularly if he or she serves on a committee dealing with judicial ethics. Chairwoman Soeka welcomed that suggestion as well. She would talk to John Decker, who serves on the Judicial Council as president-elect of the State Bar, about it.

Judge Pappas wondered if any law professors at Wisconsin have done research on this. Chairwoman Soeka responded that Professor Dickey has volunteered to serve as reporter to the committee. Although he has not done extensive research in this area, he is interested in the problem. Chairwoman Soeka doubted there was much legal literature on the subject. She asked the law librarian at Marquette to do a Lexis-Nexus search, but couldn't find any articles about it. Almost the only things written about it appear in the popular press, not the legal literature. Also, there don't seem to be any cases dealing with the question.

Professor Schultz noted that the American Bar Association has a Standard saying there should be a method for an alternative hearing panel, but it doesn't say how it should be constituted or give any particulars.

NOTE: Due to a malfunctioning tape recorder, the final 15 minutes of committee dicussion was not recorded or available to the person preparing this summary.

PLANS FOR FUTURE MEETINGS
(Agenda Item III)

Chairwoman Soeka noted that the next meeting of the committee will be Friday, February 16 at the State Capitol. The committee will continue to meet following each monthly Judicial Council meeting on the following Fridays: March 16, April 20, May 18 and June 22.

ADJOURNMENT
(Agenda Item IV)

There being no further business to come before the committee, it stood adjourned at 11:30 a.m.

JLF:dk

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
SUMMARY OF PROCEEDINGS

Room 314 Northwest
State Capitol
Madison, Wisconsin

10:30 a.m.
February 16, 1990

CALL TO ORDER AND ROLL CALL
(Agenda Item I)

Chairwoman Soeka called the committee to order and the roll was taken.

COMMITTEE MEMBERS PRESENT: Professor Eva M. Soeka, Chair; Kenneth P. Casey; John R. Decker; Jack Dewitt; Professor Joel B. Grossman; James D. Jeffries; J. Denis Moran; Bruce Munson; Professor David E. Schultz.

COMMITTEE MEMBERS EXCUSED: Judge Frank Crivello; Judge Vivi L. Dilweg; Judge Peter G. Pappas.

OTHERS PRESENT: Professor Walter J. Dickey; Diane Keleher.

APPROVAL OF MINUTES
(Agenda Item II)

There being no additions or corrections to the summary of proceedings of the January 19 meeting, Chairwoman Soeka directed that it stand approved.

DISCUSSION OF COMMITTEE ASSIGNMENT
(Agenda Item III)

Chairwoman Soeka suggested that the committee begin by reviewing the provisions of the Wisconsin Constitution defining the role of the Supreme Court in the disciplinary/disability process of a Supreme Court justice, and identifying situations in which those provisions might cause a problem.

Mr. Dewitt presumed that the problem situations would include a finding by the Judicial Commission that a justice had violated the judicial code of ethics, or an allegation that a justice was physically or mentally unable to perform his or her duties.

Professor Dickey observed that some ethical violations, and some medical conditions, are more serious than others. Article 7, section 11 gives the Supreme Court the power to "reprimand, censure, suspend or remove for cause or for disability." The underlying facts may be conceded; the severity of the disciplinary sanction may be the only issue for the Supreme Court to decide.

Professor Grossman responded that minor violations are usually handled by a private reprimand or warning from the Judicial Commission without seeking formal discipline by the Supreme Court. Sometimes in the past, it has come to light that a judge is chemically dependent. Usually, he or she can be persuaded to seek voluntary treatment rather than have formal public charges filed. There is no reason to believe a Supreme Court justice would be treated any differently in that regard.

Mr. Moran said that it was not inconceivable that a judge or justice would refuse voluntary treatment in these circumstances. Indeed, it is perhaps more likely the Court will be faced with this kind of situation than embarrassed by having to remove a justice who has already been convicted of a felony. At that extreme end, there doesn't seem to be any reason why the Supreme Court couldn't handle it. The constitution itself prohibits convicted felons from holding judicial office.

Well, supposing it doesn't go to a criminal conviction, suggested Professor Dickey. There's still the remedy of impeachment for "high crimes and misdemeanors." Mr. Dewitt doubted that people would be eager to pursue that process; it's done by the legislative branch, it's messy and political.

Mr. Moran agreed. Why should a justice be disciplined differently from any other judge?

Professor Dickey responded that his point is merely that there are methods to remove a justice from office for cause other than under the Supreme Court's disciplinary powers. If the court can't, or won't exercise that power against one of its members, there is a check. Another option is for the justice under suspicion, and perhaps others, to recuse themselves, and whoever is left decides.

Mr. Moran thought that alternative posed serious problems. Seven is a very intimate number of persons to make major decisions of law and policy, working and mentally wrestling together for years. A justice would almost have to recuse himself from a decision which could ruin the career and reputation of a colleague. It's not the same as recusing oneself from an appeal because you own stock in one of the parties.

Professor Dickey felt that might be true for the borderline case. But in the extreme, would the entire Court recuse itself from removing a colleague who had been in a coma for months with no chance of recovery? Do we need an alternative court for that?

Mr. Munson wondered why the argument that the Court can't deal with its own hadn't been made in 1977 when Article 7, Section 11 was put before the electorate for ratification. Without pretending the duty would be pleasant, it is clearly a responsibility which comes with holding high office. Perhaps what we should concentrate on is insuring that the findings and recommendations of the factfinding panel are so solid that the Supreme Court is unlikely to shirk its duty. The hearing panel can be either 3 appellate judges or a jury of 12 citizens presided over by a Court of Appeals judge. Perhaps the statute should require the jury option if the accused is a Supreme Court justice.

Section 757.19, stating the grounds upon which a judge must disqualify himself or herself, does not require recusal merely because the subject of a charge is a fellow Supreme Court justice. However, it allows recusal if the justice determines that he or she cannot act in an impartial manner. The Legislature could amend this statute to emphasize that recusal is not required merely because the subject matter of a disciplinary or disability proceeding is a fellow judge or justice of the same court.

Another legislative option, said Mr. Munson, would be a statute in the Judicial Commission chapter requiring the Supreme Court to refer for impeachment if sufficient justices recuse themselves that a quorum of the Court does not remain.

Professor Dickey responded that Mr. Munson has outlined some legislative options. But we haven't decided that legislation is the way to go. In the grand scheme of things, there are three options: (1) do nothing, assuming the Court can handle it or, if it can't or won't, impeachment or address can be used; (2) tinker with the procedural statutes, perhaps along the lines suggested by Mr. Munson; (3) propose a constitutional amendment addressing the issue of who should decide whether to censure, suspend, or remove a justice should the necessity arise. Legislation may also be required to implement this amendment.

Mr. Munson thought the existing procedural statutes were well conceived, on the whole. One question, however, is what would happen if the Court lacked a quorum due to disqualification or recusal.

Professor Dickey wondered what would happen if that arose on an appeal. Mr. Moran responded that the statutes don't say. Presumably, the decision of the lower court would stand because the Supreme Court could not review it. But in discipline/disability cases, there is no judgment below, observed Mr. Munson. All there is is a recommendation of the factfinding panel, which has no binding force.

Mr. Moran noted that one proposal, which would cover both appeals and disciplinary cases, would be to allow the Court to appoint a reserve judge to serve for a justice disqualified. Mr. Dewitt noted that he actively supported the judicial article amendments in 1977. It doesn't bother him to allow a retired justice, who has been elected on a statewide basis, to fill in in this situation. Another alternative would be to make the recommendation of the factfinding panel binding, subject to Supreme Court review. That would probably require a constitutional amendment, however.

Mr. Munson said that not only the justices, but perhaps appeals judges as well, may have a conflict of interest. Appeals judges probably want to become justices some day, and a vacancy enhances that opportunity. Mr. Moran responded that there is no pattern of appeals judges becoming justices. None of the three justices who have joined the Court since the Court of Appeals was created in 1978 served on the Court of Appeals first.

Mr. Moran reiterated that the justices work so closely together that, if one were a trial judge and another a litigant, the opposing party would be absolutely justified in demanding a recusal. If the judge didn't recuse himself, complaint could be made to the Judicial Commission. Even if the justices aren't

that close in reality, the perception of possible bias would remain. Mr. Munson said one way to remove that perception is to insist on the jury trial at the factfinding stage, rather than leave it to appellate judges.

So, it seems we are faced with a problem of what would happen in the event of "mass recusal," said Mr. Dewitt. Mr. Munson suggested that address or impeachment should lie.

Mr. Casey questioned transforming a judicial displine proceeding into a legislative impeachment or address proceeding. The two processes are too dissimilar to meld easily. Mr. Dewitt agreed. No one denies that impeachment, address and recall can be used against a justice. But, when the new judicial article gave the Supreme Court disciplinary power, a fourth procedure was created. It is that procedure with which we are concerned, and the possibility of mass recusal.

Clearly, the Supreme Court's power is a superior system of judicial discipline for judges below the Supreme Court level, said Mr. Dewitt. Impeachment, address and recall are not effective remedies for misconduct or medical incapacity at the trial level. Furthermore, so much of the Supreme Court's work is done out of public view that probably the justices would be first to realize that a colleague's health was severely failing.

Professor Dickey wondered whether the Supreme Court justices share the Judicial Commission's view that this matter needs attention. They may have no intention of recusing themselves should they ever be required to exercise their disciplinary control over a fellow justice.

Mr. Munson reiterated his suggestion that a statutory change be made to minimize the problem of an appearance of impropriety if a justice fails to recuse himself. If, however, a justice honestly feels he can't decide impartially, voluntary recusal should still be available. The other thing is, removal by address, while it requires a two-thirds vote of the Legislature, does not carry the moral opprobrium of impeachment and could be used in the disability cases if a majority of the Court recuses itself.

Chairwoman Soeka said it was her understanding that removal by address has never been used. That doesn't mean it couldn't be, especially if grounds for impeachment did not exist, as in the medical cases.

Professor Schultz wondered about mandatory recusal. What if a justice is related to one of the parties? Mr. Dewitt noted that that situation arose when Justice Fairchild's son was attorney general. And, said Professor Grossman, when Ramsey Clark became attorney general, Justice Clark retired from the bench. Professor Grossman suggested that the committee familiarize itself with the 1982 Marquette Law Review article about these questions. He hasn't read it recently, but it has a thorough discussion of these issues. As he recalls, it doesn't put much faith in the efficacy of these alternate methods. Removal by address is basically a legacy from the colonial period's distrust of judges and lawyers.

Mr. Dewitt agreed. The whole idea of vesting disciplinary power in the Supreme Court was to let the judicial branch regulate itself. The other methods didn't work, so we shouldn't be too hasty to rely on impeachment and address. Mr. Jeffries agreed. We are not here to talk about impeachment and address. We are here to make the judicial removal power effective, if it is not already. Mr. Moran agreed. If there is a problem regarding how the Supreme Court's power could be used against one of the justices, it is no answer to point to the pre-existing removal mechanisms. If the Court can't fairly adjudicate the matter, how can it invite the Legislature to remove one of their number? If the solution requires a constitutional amendment or legislation, surely the views of the Court will be solicited in the legislative process. It is most unlikely the Court will ask the Legislature to take back the authority the Court was granted in 1977.

Professor Dickey agreed. Last month's minutes indicate a consensus that the key question is "who decides" whether to censure, suspend or remove a justice. The constitution gives the power to the Supreme Court. Is that sufficient? Or should the constitution prescribe, or empower the Supreme Court to constitute, an alternate tribunal? Is there a need to refine the procedures, without amending the constitution? As Mr. Moran suggests, it may be helpful to know, at least in a general way, the views of the justices on these questions.

Mr. Moran volunteered to make sure the justices know about our deliberations.

Mr. Dewitt welcomed that offer, but cautioned that the committee should examine the issues carefully and arrive at an independent judgment, whether or not members of the Supreme Court feel the present laws are adequate to the needs of the state. Mr. Jeffries agreed. We have already voted to undertake this project, which means we will give it thorough and independent study. However, we may reach consensus that neither a constitutional amendment nor legislative change is necessary or desirable.

Chairwoman Soeka agreed. The Judicial Council asked us to look at this and we have agreed to do so, although there are other projects waiting for us. The questions raised by the Judicial Commission were serious enough to require careful study. But we have not agreed that any legislation or constitutional change is required.

Mr. Dewitt hoped the Supreme Court will be kept aware of our deliberations, but not asked to comment in any formal way, at least until we are further along in our own thinking. We are trying to anticipate a problem the Court may one day face and we must carefully evaluate the alternatives. And by that he does not mean impeachment or address, because by definition the problem is how the Court can deal with its own.

Professor Grossman agreed. The constitution gives the Supreme Court disciplinary power, to be exercised pursuant to legislatively enacted procedures. While Professor Grossman wasn't sure that a problem exists, it might be solved by the Court appointing an ad hoc panel to recommend the discipline to be imposed or by the Court deciding that itself, despite recusals. Current law allows the factfinding to be done by a jury, although this option has never been used. So, at the factfinding level we already have tribunals other than the Supreme Court itself. That doesn't directly address the problem, since the factfinding panel

has no dispositional power. The problem, if it exists, is at the dispositional stage. At this stage the jury is no more helpful or reliable than a panel of appellate judges. If the issue is whether X ethical violation warrants removal versus a three-year suspension, the jury may be less appropriate than a judicial panel, with at least some appreciation of precedent. Juries are typically excluded from dispositional phases for this reason. From what county or counties will such jurors be selected? Some states let their judicial commissions actually impose discipline, although Wisconsin does not. So, that might be an option.

Chairwoman Soeka asked whether the issues depended on whether the proceeding was for misconduct or disability. Mr. Dewitt responded that both situations could present problems. The disability case might present issues as to whether the justice will recover, or how frequently and seriously his or her health problems affect mental functioning. Professor Grossman responded that those issues are usually determined by the factfinder, not the Supreme Court in its dispositional role. It may not always be handled in an ideal way, but it is not simply dropped in the Court's lap. Furthermore, there are some medical problems, relating to chemical dependency, which could be considered misconduct as well as disability. Unfortunately, the statutes regulating the procedure lump disability and misconduct together for the most part. It would be somewhat awkward to separate them solely as applied to Supreme Court justices.

Mr. Moran agreed. Most disability cases initially come to the Judicial Commission's attention as alleged misconduct. But in many ways, these substance abuse cases are the easy ones.

Professor Dickey observed that if the factfinding procedure is fair and reliable, any problem with disposition is largely taken care of. Once the factfinding panel has found that the judge can no longer perform, or has engaged in an ethical violation, the Court might not have that much trouble imposing appropriate discipline.

Mr. Munson said that public confidence is an important value here. That is one reason he suggested using the jury option, rather than appellate judges, whose work product is frequently reviewed by the high court. Particularly when the factfinder exonerates the justice, there may be more public acceptance if it is done by a jury of ordinary citizens rather than a panel of appellate judges.

Professor Dickey said that public confidence is certainly important as is accurate and reliable factfinding. Mr. Moran doubted that trial or appellate judges saw the Supreme Court's appellate and supervisory powers as sufficient to influence their findings of fact or conclusions of law. Lawyers might be more hestitant to recommend removal than judges, who never appear in the Supreme Court as litigants.

Chairwoman Soeka invited the committee to give further thought to the types of situations which might arise. Mr. Dewitt said that the case of Justice William O. Douglas is one which should give us pause. The U.S. Supreme Court was unwilling or unable to deal with the severe and ongoing incapacity of one of its members. Professor Grossman agreed. Although the Judicial Commission needn't receive a complaint, but can act on its own initiative, it would certainly think twice about initiating a disability proceeding against a justice. That is at least partly due to the fact that so much of the justices' work is done out of public view.

Mr. Moran noted that the Supreme Court is interested in the work of this committee for two reasons. First, we may be able to provide useful guidance regarding who should decide the outcome of ethical or disability proceedings against a justice. Second, each justice is a potential subject of such proceedings, with an interest in accuracy of factfinding and fairness of adjudication. The question of "who decides" obviously implicates that interest as well.

Mr. Munson said he assumed that even before the revised judicial article gave the Supreme Court direct removal power, the Court could effectively remove a justice by revoking his or her license to practice law. Mr. Moran agreed that was the case. That method would utilize the Board of Attorneys Professional Responsibility, rather than the Judicial Commission, as the investigative and recommending body. But ultimately the question lands in the lap of the Supreme Court either way.

Mr. Dewitt agreed. The Supreme Court is the ultimate decisionmaker in either lawyer discipline or judicial discipline matters, as it should be. The bothersome problem is that of recusal. If, because of the collegial relationship, they cannot or should not decide the matter, the power must be vested in a tribunal which has no ongoing responsibility for the discipline of lawyers and judges. And, that will probably require a constitutional change. Waiting for an actual case to arise will complicate matters by requiring the Court to act in the glare of publicity and without time for the constitutional amendment process to run its course. The political acceptability of any proposed remedy, in the Legislature and among the electorate, may be colored by the facts of a pending disciplinary proceeding. That is why it is useful to think about these problems now, in the abstract.

Furthermore, said Mr. Casey, if we don't like the remedy of address, which is essentially more political than judicial, that is all the more reason to consider the problem carefully. If the entire Court recuses itself, address may be the only remedy available.

Mr. Moran agreed. The Legislature may be tempted to define as disabled a justice whose decisions contravene legislative perceptions of the popular will.

PLANS FOR FUTURE MEETINGS
(Agenda Item IV)

Chairwoman Soeka reminded the committee that it will meet next on Friday, March 16 at the State Capitol.

ADJOURNMENT
(Agenda Item V)

There being no further business to come before the committee, it stood adjourned at 11:50 a.m.

JLF:dk

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
SUMMARY OF PROCEEDINGS

Room 421 South
State Capitol
Madison, Wisconsin

10:30 a.m.
March 16, 1990

CALL TO ORDER AND ROLL CALL
(Agenda Item I)

In the absence of Chairwoman Soeka, Professor Dickey was delegated to chair the meeting. He called the committee to order and the roll was taken.

COMMITTEE MEMBERS PRESENT: Professor Joel B. Grossman; J. Denis Moran; Bruce Munson; Judge Peter G. Pappas; Professor David E. Schultz; Stephen D. Willett.

COMMITTEE MEMBERS EXCUSED: Professor Eva M. Soeka, Chair; Kenneth P. Casey; Judge Frank Crivello; John R. Decker; Judge Vivi L. Dilweg; Jack DeWitt; James D. Jeffries.

OTHERS PRESENT: Professor Walter J. Dickey; Diane Keleher; Judge Robert Sundby.

DISCUSSION OF COMMITTEE ASSIGNMENT
(Agenda Item II)

Professor Dickey informed the committee that during the last month, he had held discussions with Chief Justice Heffernan and Ms. Elena Cappella, Executive Director of the Judicial Commission.

Ms. Cappella is primarily concerned about the appearance of impropriety which would exist if the Supreme Court were called upon to discipline a justice. Even if the Court imposed discipline, there would be widespread public perception that the Court could not deal with the matter objectively. Since the Wisconsin Constitution does not currently permit an alternate tribunal, an amendment may be required to prevent self-dealing, or the appearance thereof.

The Chief Justice indicated that the justices probably believe they can deal fairly with one of their own members. Justices have not recused themselves from imposing discipline on other judges, despite the existence of friendships. The Chief Justice was skeptical that justices would be called as witnesses in disability cases against other justices. The factfinding panel would build a record which the Supreme Court can review, as it does so many others. Also, Chief Justice Heffernan informed Professor Dickey that Chief Justice Beilfuss had studied this question carefully some years ago and concluded that it was not a problem. In the remote circumstance that a quorum could not act impartially,

the Supreme Court would probably resort to the doctrine of necessity and appoint an alternate tribunal to act as the Supreme Court for that matter. That would be within the Court's inherent power, although the constitution does not authorize temporary service on the Supreme Court as a general rule. But the Chief Justice was skeptical such a quorum problem would ever arise. In Professor Dickey's view, the Chief Justice has clearly thought carefully about these matters and concluded that a constitutional amendment is not necessary.

Professor Dickey said he has also attempted to contact the former Chief Justice of Minnesota and the director of the Texas Judicial Commission. Both states have had substantial problems involving the discipline of Supreme Court justices. However, he has not been successful in reaching either of them yet. In Minnesota, the entire Court recused itself and appointed a special Supreme Court to hear a discipline matter against a justice.

Mr. Munson said he shared the Chief Justice's confidence that the Court could deal fairly with one of its own members. However, he also shared Ms. Cappella's concern about public confidence in the process. For that reason, he has proposed, and still advocates, a statute providing that no justice is required to recuse himself or herself solely because the subject of a disciplinary proceeding is a fellow member of the Supreme Court.

Mr. Moran wasn't sure the Legislature's attention should be called to this issue at all. However responsible our own recommendations, the legislative process can take unexpected twists and turns.

Mr. Willett agreed we should be reluctant about proposing constitutional amendments, for the reasons expressed by Mr. Moran and for other reasons. On the other hand, we should not underestimate the difficulties which may be presented. One of the Minnesota justices is an acquaintance of Mr. Willett's. There is no question that that Court was placed in a very difficult position by that situation, and forced to change its own thinking as events developed. For this reason, he would encourage Professor Dickey to continue his research into what has happened in other states.

Mr. Moran said he was somewhat familiar with the Texas situation, which involved million dollar campaign contributions to justices by parties to billion dollar litigation before that Supreme Court. The majority of the justices, if not all, were implicated in the scandal. Perhaps a middle ground would be to ask our Supreme Court to adopt rules specifying what it would do in the event such a situation were to arise here, rather than go the constitutional amendment route. He would also encourage our reporter to contact the American Judicature Society.

Professor Grossman said that the problem is most likely to arise when more than one justice is implicated in a potential ethical scandal. Although that has happened in other states, the chances of that are still rather remote. Like other members of this committee, he doesn't feel that a constitutional amendment or a legislative remedy is required at this time. If such a situation arises, and the Court is not able to deal with it under its disciplinary powers, legislative interest in a remedy will then be warranted. For now, it may be more appropriate for us to describe the possible problem and ask the Supreme Court to think about what it would do, before an actual case arises.

In a way, this would be the opposite of what Indiana has done. Rather than create a special, alternate tribunal, we would be seeking ways to allow the Court to remain the disciplinary body, but handle any potential problems through procedural rules. One such rule might say there is no presumption in favor of recusal.

Mr. Munson said that was what he is suggesting. Furthermore, if the Judicial Commission performs well, it may not be all that difficult for the Court to act on the basis of its findings and recommendation.

Professor Grossman agreed. The facts found by the three-judge panel are rarely if ever reversed by the Supreme Court. The standard of review is very high, as with other types of Supreme Court review of factual findings by inferior tribunals.

There is still the dispositional aspect, which the Court treats as a question of law, i.e., for it to decide without deference to the decision below, said Professor Dickey.

Professor Schultz wondered if other states which have had Supreme Court ethical problems had Judicial Commissions similar to ours. Mr. Moran responded that every state has some type of judicial discipline body. The question is, how effective are they? In his view, the system in Minnesota is not that different from Wisconsin. And, said Professor Grossman, in some states the Judicial Commission actually imposes the discipline. Maybe we should contact Professor Jeffrey Shaman, the Director of the Center for Judicial Conduct Organizations at the American Judicature Society in Chicago. He is familiar with the various situations which have arisen in the states, and how their judicial discipline systems are organized.

Judge Pappas said the idea of dealing with this by Supreme Court rule rather than constitutional amendment or legislation, has appeal for him.

Professor Grossman agreed. The only problem is, the Court could probably not do by rule what the Indiana Supreme Court did.

Is there a difference between what the Court can do under its administrative rulemaking authority and what it can do pursuant to the doctrine of necessity in an actual emergency, asked Professor Schultz. Professor Grossman responded that that question was also one for our Supreme Court to decide.

Professor Dickey suggested the following hypothetical situation: one justice is charged with an ethical violation and discipline is recommended by the hearing panel. That justice and three others recuse themselves. Relying on the doctrine of necessity, the Court appoints four appellate judges to serve temporarily on the Supreme Court for this case. The Court imposes discipline on the accused justice. If the disciplined justice believes the Court acted ultra vires in appointing substitute justices, where could this claim be pressed? Is a federal issue presented? No, it's a question of interpreting the Wisconsin Constitution, the final arbiter of which is the state Supreme Court.

Mr. Moran said that at least two of the justices who have been disciplined in other states have raised similar jurisdictional claims, within the disciplinary proceeding. However, they were not successful.

Judge Pappas wondered whether federal relief might be available on a civil rights theory.

Professor Dickey felt that argument was distinguishable. Obviously, state courts must observe federal civil rights. But, the issue here is, does the Wisconsin Constitution permit the Supreme Court to protect and exercise its disciplinary authority by measures it deems appropriate to the need? It's a state constitutional law question, not a federal question. So, if our Supreme Court wants to appoint substitute justices, or an alternate tribunal, it can do so if it decides it has that inherent power.

Mr. Moran still felt there was a distinction between the hypothetical posited by Professor Dickey and the power of the Supreme Court to provide such expedients by rulemaking, before an actual case arises. If the federal courts are asked to intervene, they will be more likely to abstain if an actual emergency exists.

Professor Schultz disagreed. If the procedure adopted violates the accused justice's civil rights, the federal courts should strike it down, whether it was established under the Supreme Court's rulemaking powers, or its inherent power to deal with a case or controversy. If the procedure does not violate constitutional rights, there is no federal question.

Mr. Munson said the committee seems to have come around to the position he espoused at our first meeting, which is that the Supreme Court, like the Governor and Legislature, can delegate its authority to others as the need requires. Therefore, like other members of this committee, he could support Supreme Court rules as a remedy for this problem.

Professor Dickey suggested that, before issuing our report to the Supreme Court, we should probably continue to obtain information about the situations which arose in Texas and Minnesota, and invite Professor Shaman to contribute to our deliberations.

Mr. Munson said he had a question which the committee may find interesting. One of the grounds for vacating an office listed in the statute is conviction of a felony. Is it necessary for the disciplinary process to run its course in this event? Doesn't the conviction work a forfeiture of office by operation of the Wisconsin Constitution, without any action on the part of the Judicial Commission or the Supreme Court?

Mr. Moran thought the answer was yes. However, in the case of Judge Alex Ranieri, the Court elected to follow the disciplinary process anyway.

Mr. Munson wondered whether similar reasoning would apply to a justice placed under guardianship for mental incapacity. Section 17.03 of the statutes says that if a public official is placed under guardianship, his or her office becomes vacant. Mr. Munson wondered whether it would be necessary for the Judicial Commission to investigate and prosecute that case.

Mr. Moran said that there are a variety of provisions through which a justice might be removed other than by operation of the Supreme Court's disciplinary power. The constitution also prohibits any "defaulter" from holding public office. Does anyone know what this means? (Reporter's note: see State ex rel. Shea v. Evenson, 159 Wis. 623 (1915).) Some of these grounds for ineligibility for office might require factual determinations by quasi-judicial bodies, ultimately reviewable by the Supreme Court.

PLANS FOR FUTURE MEETINGS
(Agenda Item III)

The next meeting of the committee will be Friday, April 20 at the State Capitol.

ADJOURNMENT
(Agenda Item IV)

There being no further business to come before the committee, it stood adjourned at 11:20 a.m.

JLF:dk

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
SUMMARY OF PROCEEDINGS

Room 213 Northwest
State Capitol
Madison, Wisconsin

10:00 a.m.
April 20, 1990

CALL TO ORDER AND ROLL CALL
(Agenda Item I)

Chairwoman Soeka called the committee to order and the roll was taken.

COMMITTEE MEMBERS PRESENT: Professor Eva M. Soeka, Chair; Kenneth P. Casey; Jack DeWitt; Judge Vivi L. Dilweg; Professor Joel B. Grossman; Judge Peter G. Pappas; Professor David E. Schultz.

COMMITTEE MEMBERS EXCUSED: Judge Frank Crivello; John Decker; James D. Jeffries; J. Denis Moran; Bruce Munson; Stephen D. Willett.

OTHERS PRESENT: Professor Walter J. Dickey; Diane Keleher.

APPROVAL OF MINUTES
(Agenda Item II)

There being no additions or corrections to the minutes of the March 16 meeting, Chairwoman Soeka directed that they stand approved.

DISCUSSION OF COMMITTEE ASSIGNMENT
(Agenda Item III)

Chairwoman Soeka noted that Professor Dickey has prepared a memo for our review today. However, it wasn't sent out with our materials last week because remodeling in the State Capitol temporarily disrupted mail service to the Judicial Council office. Ms. Keleher is preparing copies for us right now, but Professor Dickey also has matters he wishes to report on orally.

Professor Dickey noted that, pursuant to the committee's request, Mr. Fullin contacted Jeffrey Shaman of the Center for Judicial Conduct Organizations, which is affiliated with the American Judicature Society in Chicago. Professor Shaman respectfully declined to attend our meeting today, saying that he felt he had very little expertise in the specialized area of procedures for discipline of Supreme Court justices.

The memorandum which Ms. Keleher is copying, which we will get to later, is a draft letter to the Wisconsin Supreme Court describing this committee's work and our recommendation that the Court consider rulemaking in this area.

Professor Dickey noted that, during the last month, he had contacted both the general cousnel of the Texas judicial discipline agency and the executive director of the Minnesota Board on Judicial Standards. Both acknowledge that discipline of a Supreme Court justice presents probems, although they did not express great concern about it.

In Texas, the judicial discipline agency is specified in the constitution. That body has the power to impose discipline itself against lower court judges, and may publicly reprimand Supreme Court justices. A reprimand can be appealed to the Supreme Court, even if the subject of the reprimand is a justice. Also, discipline beyond reprimand of lower court judges can be appealed to the Texas Supreme Court. It is not clear how removal, or discipline beyond reprimand, would be handled against a justice of the Texas Supreme Court. Removal can be ordered by a panel of appellate judges, but this is appealable to the Texas Supreme Court.

Several years ago, a Supreme Court justice was publicly reprimanded by the judicial misconduct body of Texas. The justice chose not to appeal, and the matter ended there. Basically, Texas would face the same questions we have discussed if such an appeal were taken.

Professor Dickey said he also spoke with Richard Aretz, Executive Secretary of the Minnesota Board on Judicial Standards. One of their Supreme Court justices, John J. Todd, was planning to retire to Florida and took the multi-state bar exam in order to obtain a law license there. He was accused of cheating on the examination. The Minnesota Supreme Court had no procedures for dealing with such a situation. All justices recused themselves and on December 29, 1983, the Court of Appeals was ordered to hear and decide the matter en banc. However, Justice Todd resigned from the Supreme Court and the matter was not pursued further. No challenge was brought to the authority of the Supreme Court to appoint the Court of Appeals to hear this matter. Later, the Minnesota Supreme Court issued a rule stating that when any charge has been filed against a member of the Supreme Court, it shall be heard and determined by a panel consisting of the Chief Judge of the Court of Appeals or his designee and six others chosen at random from among the judges of the Court of Appeals by the Chief Justice.

It should be noted that Minnesota's constitution does not imply, as does Wisconsin's, that judges may not be assigned to temporary service on the Minnesota Supreme Court. As we have discussed, our constitutional clause allowing the Chief Justice to assign judges to sit in any court of record other than the Supreme Court creates a negative implication, although it does not expressly forbid our Court from doing what the Minnesota Supreme Court did, should the necessity arise.

Judge Dilweg said she had had occasion to discuss this committee's deliberations with Chief Judge Burton Scott of the Wisconsin Court of Appeals. Judge Scott feels it would be equally difficult, if not more so, for the Court of Appeals to handle such a matter en banc. He feels it would be preferable for the remaining justices of the Supreme Court to handle the matter rather than recuse themselves as the Minnesota justices did.

Professor Dickey responded that in his conversation with Chief Justice Heffernan, he was given the understanding that the matter would be handled as Judge Scott suggests, unless there were not a quorum remaining on the Supreme Court. In that event, individual appellate judges would probably be designated to act as justices for the case so that a quorum may be had. Members of the Court have not recused themselves from deciding disciplinary cases involving other judges, despite having served with them as colleagues on lower courts.

Professor Grossman observed that there will always be relationships, social and professional, among judges. No remedy will avoid that problem, except vesting the ultimate disciplinary authority in a panel of persons other than judges. But that would be a fairly radical departure for Wisconsin. Judge Dilweg observed that there is no logical reason to limit the authority of such a special tribunal to Supreme Court justices. So, to recommend that would essentially take the Supreme Court out of judicial discipline completely.

Mr. DeWitt thought it was very important that the Court consider how it would handle such matters before an actual case arises. Even if there is never an ethical charge against a justice, it is not that difficult to envision that failing health may leave a justice unable to perform his duties. It has happened to circuit court judges, and now that the mandatory retirement age has been repealed, it could happen on the Supreme Court as well.

Professor Dickey responded that that suggestion is part of the report which this committee contemplates sending to the Court, copies of which have now arrived for our review and discussion. Obviously, a judge must recuse himself from a case in which he may be called as a witness. However, Chief Justice Heffernan did not feel it would be likely that Supreme Court justices would be witnesses in a disability case against a fellow justice. An adequate record could be made before the factfinding panel of appellate judges, based on medical evidence and testimony of persons other than justices. The Supreme Court would review that record as it does any other for sufficiency to support the findings. Evidence not appearing in the record would not be considered by the justices in deciding whether suspension or removal was warranted.

The committee took several minutes to read Professor Dickey's draft report, before discussing it.

Chairwoman Soeka announced that Mr. Willett is unable to be with us today because his presence is required in another Judicial Council committee. However, although he does not support a constitutional amendment or legislation, he does support the Council's sending a report to the Supreme Court, urging it to consider the matter and adopt rules before an actual controversy arises. Do other members of the committee have comments about the draft report?

Professor Grossman said the report certainly heads in the right direction. However, he believes it should be expanded, going into more detail about the type of situations which might arise and the problems which have been experienced in other states. But the general tenor of the report is good. It basically says, "Here are some potential problems we have identified. As the judicial disciplinary body for the state, the Court may wish to consider how it would handle them before a case or controversy arises." Simply as a matter of style, perhaps we should go

a bit more into the issue of recusal on the basis of personal knowledge, friendship, etc. Also, we should elaborate on the disability aspect Mr. DeWitt has mentioned.

Professor Schultz agreed. We seem to have been strongly influenced by Chief Justice Heffernan's view, as related to us by Professor Dickey, that most justices would probably not recuse themselves merely because the subject of the proceeding was a fellow justice. Clearly, the Minnesota Supreme Court took the other view in the Todd case. Individually and collectively, the justices recused themselves, apparently for no other reason that that they served with him. We on this committee do not feel that justices should be required to recuse themselves simply for that reason. In fact, Mr. Munson has suggested a statute specifically so providing. On the other hand, if several justices decide to do so, the problem might be greater than presently appears.

Judge Dilweg saw no need to make the report long and detailed. Professor Dickey's draft is sufficient to make the justices aware of the potential problems and the advantages of anticipating them. We don't need to paint pictures for our Supreme Court; they will understand what we are talking about.

Professor Dickey said that if our report includes copies of the rules adopted in other states, it is more likely to persuade the Court to take that approach.

Another thing we might do, said Judge Dilweg, is offer to help the Court draft rules if they request that assistance. Committee members agreed.

Chairwoman Soeka suggested that the report also include a list of the members of this committee. That way the Court will see that it wasn't just ivory tower academics who came up with this recommendation. Professor Grossman begged her pardon, and Chairwoman Soeka said she had been referring primarily to herself and Professors Dickey and Schultz. Also, said Professor Grossman, we should include minutes of our deliberations. The Supreme Court gets copies of the Judicial Council minutes, but not those of Judicial Council committees. The committee agreed to include these as an appendix to its report.

Chairwoman Soeka suggested, and the committee agreed, to include as an appendix to the report the Judicial Commission letter which invited the Judicial Council to study this problem.

Judge Pappas wondered whether it will be possible to get the materials for next month's meeting more in advance than usual. Professor Dickey said that he would complete his redraft of the report next week and urge Mr. Fullin to complete and send the minutes two weeks, rather than one week, in advance of the May 18 meeting.

Professor Dickey suggested thinking about what kind of rule the Court might adopt. One option, obviously, is the Minnesota rule stating that if a Supreme Court justice is the subject of a disciplinary proceeding, it will be heard by a seven-judge panel chosen by lot from among the Court of Appeals. Another option might be that if, because of disqualification and recusals, the Supreme Court lacks a quorum to adjudicate such a matter, substitute justices will be selected in that manner. A third option might be that even if a quorum is not lacking, any justice who is disqualified or recuses himself or herself will be replaced in that manner.

Another option, said Judge Dilweg, would be to allow judges other than appellate judges to be appointed to such service. The Court may wish to appoint a circuit judge or a reserve judge.

Mr. DeWitt presumed that we are not recommending any changes in the procedure by which disability or ethical charges are investigated by the Judicial Commission and prosecuted before the three-judge panel which finds the facts and makes the recommendation for discipline or removal. The committee agreed that was the case. So, for example, if a justice agrees to undergo treatment for chemical dependency as an alternative to having a formal complaint filed, the need for an alternate tribunal will not arise, said Mr. DeWitt. The committee agreed that was the case. The rule would only address the question of who sits on the Supreme Court when formal charges have been filed, the facts have been found and the recommendation for discipline has been made.

Professor Dickey wondered aloud whether the report should include a draft of such a rule. After some discussion, the committee decided not to do so. The report could sketch in general terms what the rule might include, but not endorse any particular option. An offer to assist the Court in drafting any such rule would be preferable to a draft whose particulars might be objectionable to the Court.

Chairwoman Soeka asked if there were further comments on the draft. Hearing none, she reminded members that the committee will meet again on Friday, May 18, in the State Capitol.

ADJOURNMENT
(Agenda Item IV)

There being no further business to come before the committee, it stood adjourned at 11:05 a.m.

JLF:dk

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
SUMMARY OF PROCEEDINGS

Room 415 Northwest
State Capitol
Madison, Wisconsin

10:30 a.m.
May 18, 1990

CALL TO ORDER AND ROLL CALL
(Agenda Item I)

In the absence of Chairwoman Soeka, Judge Pappas called the committee to order and the roll was taken.

COMMITTEE MEMBERS PRESENT: Kenneth P. Casey; Jack DeWitt; Professor Joel B. Grossman; James D. Jeffries; Bruce Munson; Judge Peter G. Pappas; Professor David E. Schultz; Stephen D. Willett.

COMMITTEE MEMBERS EXCUSED: Judge Frank Crivello; John Decker; Judge Vivi L. Dilweg; J. Denis Moran; Professor Eva M. Soeka.

OTHERS PRESENT: Professor Walter J. Dickey; Diane Keleher.

APPROVAL OF MINUTES
(Agenda Item II)

Professor Grossman moved to amend the April 20 minutes by inserting "dusty" before "ivory" on page 4, paragraph 5. The minutes were unanimously approved as so amended.

DISCUSSION OF COMMITTEE ASSIGNMENT
(Agenda Item III)

Judge Pappas noted that Professor Dickey has prepared a new draft of the committee's proposed report to the Supreme Court. He reported that Judge Dilweg (who was unable to be with us today) suggests deleting the first sentence of the third paragraph, stating that a discipline or disability matter involving a justice would be handled the same as that involving a judge of a different court. She feels that statement is too obvious to mention to the Supreme Court. However, Professor Dickey felt that this report will have a wider audience than the Supreme Court alone. The report will probably be of some interest to the news media, and it is important that they understand that our suggested rules pertain to the adjudicative, not investigative, stage of the proceedings.

Judge Pappas brought up another stylistic matter suggested by Judge Dilweg. On page 2, fourth paragraph, delete the first sentence and substitute what is

now the second last paragraph of the report. Professor Dickey agreed that this change improved the overall flow of the report and eliminated redundant language.

Judge Pappas related a third suggestion from Judge Dilweg. That is, eliminate the fourth last paragraph of the report. This suggestion was not well taken by the committee. Mr. DeWitt thought the suggestion of selecting the decision panel by lot was a sound one, and would eliminate suspicion that the hearing panel was biased. Professor Grossman liked the idea of allowing circuit judges as well as appellate judges to serve on this tribunal. However, he suggested, and the committee agreed, to refer to "circuit and appellate judges" rather than "all judges," which might be construed to include municipal ones.

Judge Pappas suggested, and the committee agreed, to insert a clause emphasizing that the Council believes the Court should deal with these questions before an actual case or controversy arises.

Mr. Jeffries asked for clarification of the last sentence on page 2. What does it mean to say that "The ordinary procedures applicable in other cases would be followed?" Professor Dickey responded that this refers to the investigative work of the Judicial Commission, the filing of the formal complaint, and the factfinding hearing before the three-judge appellate panel or jury. Mr. Casey suggested that a reference to the Judicial Commission might be helpful for clarification in this regard.

Mr. Munson had a question about the first sentence on page 3. To suggest that "such matters would normally be handled by the Court" is not quite as forceful as saying "we don't think there is a conflict of interest simply because the subject of the proceeding is a member of the Court."

Professor Dickey responded that he thought Mr. Munson's point was that judicial discipline is a Supreme Court responsibility, which we should emphasize in our report. Professor Dickey agrees; that's what the first sentence on page 3 does. After some further discussion, the committee agreed to reword the sentence to read, "That such matters remain the ultimate responsibility of the Court."

Mr. DeWitt suggested, and the committee agreed, to add to the next paragraph a reference to the reason for selecting the tribunal members by lot, namely, to avoid any appearance of impropriety.

There being no further additions or corrections to the draft report, Mr. DeWitt moved that it be presented to the Judicial Council at its June 22 meeting in Oshkosh. The motion was seconded by Mr. Willett and adopted unanimously.

Judge Pappas thanked the members of the committee for their participation in its deliberations.

ADJOURNMENT
(Agenda Item IV)

There being no further business to come before the committee, it stood adjourned sine die at 11:00 a.m.

JLF:dk

JUDICIAL COUNCIL
DISABILITY OF JUSTICE COMMITTEE
FEBRUARY 1990

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