



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 3

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

FROM: Don Salm, Senior Staff Attorney

RE: Overview of Judicial Discipline Procedures and Available Sanctions in the 50 States and the Surrounding States; and An Overview of Federal Law Regarding Judicial Discipline of Federal Judges

DATE: July 28, 2010

This Memo, prepared for the members of the Special Committee on Judicial Discipline and Recusal, does the following:

- Provides a brief overview and analysis of judicial discipline procedures and available sanctions in the 50 states, including: (a) a table outlining and comparing the key aspects of the investigating and adjudicating bodies in the states (*Enclosure 1*); and (b) several tables briefly outlining the available informal or private sanctions, and formal sanctions in the 50 states (*Enclosure 2*).
- To provide a more specific look at the laws of certain states, compares the judicial discipline laws in the states surrounding Wisconsin (Illinois, Iowa, Michigan, and Minnesota).
- Provides an overview of the federal law regarding judicial discipline of federal judges.

JUDICIAL DISCIPLINE: 50-STATE OVERVIEW

Each state has procedures by which it disciplines judges. The disciplinary procedures in states follow a similar pattern that begins with the investigation of a complaint. If the necessary burden is met, formal charges may be issued, followed by a hearing and a decision regarding discipline, and, in some states, an appeal of that decision. The disciplinary proceedings are generally confidential until the proceedings reach a stage at which formal charges are made or formal proceedings are commenced.

A complaint alleging judicial misconduct is investigated by an investigatory body, which is generally composed of judges, attorneys, and nonattorneys. Although the composition of states' investigatory bodies is similar, the number of individuals appointed to the body, as well as the method of appointment, varies by state. The role of the investigatory body after an investigation also varies. For example, in some states, the investigatory body investigates, issues formal charges, and imposes or recommends discipline, whereas in other states, the investigatory body only investigates and issues formal charges. In the latter states, the state Supreme Court often imposes discipline. Some states offer an option to appeal a decision regarding discipline, and in states where the investigatory body imposes discipline, that decision is often appealable to the state Supreme Court. In most states, then, the state Supreme Court is the final disciplining body.

Sanctions vary and may be imposed at various stages of the process (with the most serious sanctions only available to the final authority, usually the state Supreme Court). Sanctions may include reprimand (private or public), censure, fine, suspension from the bench, request for involuntary retirement, or removal from office.

As to the most serious sanction, removal from office, a number of methods have been established, typically set forth in a state's constitution and typically involving the state's highest court and the state's judicial conduct organization. Other methods include: (a) impeachment (all 50 states have this, usually beginning with a vote in the House of Representatives on whether a judge should be impeached and then, if that passes, a trial in the Senate on whether to convict); (b) legislative "bill of address" that allows the Legislature (often requiring the Governor's consent) to vote for the judge's removal; and (c) recall (a few states), allowing judges to be removed by recall election. All of these have been rarely used and, when used, rarely successful.

Charts describing state judicial discipline procedures are enclosed with this Memo.

JUDICIAL DISCIPLINE LAWS IN SURROUNDING STATES

Overview of Laws in Surrounding States

In order to provide the committee members with a more detailed framework within which to consider the very general 50-state overview, above, this part of the Memo examines the laws in the states surrounding Wisconsin: Illinois, Iowa, Michigan, and Minnesota. This more detailed analysis of these surrounding states and a comparison thereof prompts the following observations:

- As in other states, all of these states have *created separate bodies* to specifically deal with or assist their Supreme Court in dealing with judicial discipline. This is done either: (a) as specified in detail by a state's state constitution and then clarified in state statutes and court rules (Illinois); or (b) as statutorily prescribed by the Legislature and the Supreme Court (by rule) after a general authorization in the state constitution for either the Legislature or the Supreme Court to deal with the issue of judicial discipline (in Minnesota, for example, the state constitution gives the authority to the Legislature to discipline judges, but the Legislature has directed that the Supreme Court exercise the authority to discipline judges). These bodies range from independent and powerful bodies with significant and final authority (Illinois) to bodies that just make recommendations to the Supreme Court for possible sanctions, but have little or no further authority (Iowa).

- ***From a review of all 50 states, it appears that Illinois is the only state in which the decision of the state’s judicial commission (or alternative name for that body) is final. In other states, the decision of the tier imposing discipline, if not the Supreme Court, may be appealed to the Supreme Court (or the state’s highest court, if by different name).***

- As with the rest of the states, including Wisconsin, the confidentiality of any activity relating to a judicial discipline allegation is of significant importance, and the issues become public only when the matter reaches the stage at which a formal charge is made and formal proceedings are commenced.

- The memberships of the boards or commissions in the various states are varied and interesting in their composition and their use of public members outside of the judicial/attorney arena, ranging from, in Illinois (four nonattorneys on the Judiciary Inquiry Board and two citizens on the Courts Commission), to the more complicated Iowa Commission (four electors of the state who are nonattorneys, ***with not more than two from the same political party***). Iowa also requires that its two private practice attorneys on the commission not be from the same political party.

Illinois: Judicial Inquiry Board and the Courts Commission

The State of Illinois has two independent bodies to deal with judicial discipline:

- The ***Illinois Judicial Inquiry Board*** is an independent agency created by the Illinois Constitution [Article VI, Section 15 (b)] to investigate and prosecute allegations of judicial misconduct or incapacity against Illinois state court judges. The board is composed of four nonattorneys, three attorneys and two judges, who review complaints and determine if an investigation is appropriate and which matters will be prosecuted before the Courts Commission.

- The ***Illinois Courts Commission*** (which is not part of the Judicial Inquiry Board) is an independent, constitutionally created body consisting of five judges and two citizens. The Courts Commission hears the evidence at a ***public hearing*** and decides: (a) whether charges against a judge have been proven; and (b) if proven, whether the sanction should be reprimand, censure, suspension with or without pay, removal from office, or retirement as a judge. Under the Illinois Constitution [Article VI, Section 15 (f)], the concurrence of four members of the seven-member commission is necessary for a decision; ***and the decision of the commission is final.***

As to the issue of ***confidentiality***, until the point at which the Judicial Inquiry Board publicly charges a judge with misconduct, all matters in judicial discipline cases are confidential.

Iowa: Judicial Qualifications Commission

Under the Iowa Constitution [Article V, Section 19]: (a) the Iowa Supreme Court has the sole authority to “retire judges for disability and to discipline or remove them for good cause, upon application by a commission on judicial qualifications; and (b) the general assembly shall provide by law for the implementation of this section.” Pursuant to the constitution, the Iowa Legislature created the Judicial Qualifications Commission’s Powers and Procedures. [ss. 602.2101 to 602.2107, Iowa Code.]

The seven-member commission consists of: one district judge and two Iowa private practice attorneys *who do not belong to the same political party*, as appointed by the Supreme Court Chief Justice; and four electors of the state who are nonattorneys, *with not more than two from the same political party*, appointed by the Governor and subject to State Senate confirmation.

The *purpose* of the commission is to conduct an initial inquiry of complaints against judges. If it is clear to the Commission the allegation requires further investigation or if the allegation is one of several similar allegations against the same judge, the commission must forward the complaint to the Iowa Attorney General's Office for investigation. Once that investigation is completed, the Attorney General submits a report of its findings to the commission, which then sets an evidentiary hearing date if the investigation shows clear and serious misconduct.

After the evidentiary hearing, the commission *may* make a recommendation for disciplinary action to the Iowa Supreme Court for a public reprimand, temporary suspension without pay (up to 12 months), or termination. If the Supreme Court decides to proceed, the Attorney General is the prosecutor in the proceedings on behalf of the state. The Supreme Court determines the appropriate disciplinary action and will substitute its judgment for that of the commission when it deems necessary.

As to *confidentiality*, the evaluation and investigation process are confidential up to the point when the commission makes a recommendation, if any, to the Supreme Court.

Michigan: Judicial Tenure Commission

The Michigan Judicial Tenure Commission was established by state constitutional amendment in 1968 [Article 6, Section 30, Mich. Const.], which provides that the commission have *nine members* (four judges "elected by the judges of the courts in which they serve": one a circuit court judge; one a probate judge; and one a judge of a court of limited jurisdiction; three members of the state bar (elected by members of the state bar), one of whom shall be a judge and two not be judges; *and two appointed by the Governor (may not be judges, retired judges, or members of the state bar)*).

The commission has the *authority* to review written requests for investigation that allege judicial misconduct or disability. After preliminary investigation, the commission determines whether a formal complaint should be filed against a judge. If the commission determines that more serious action is warranted, the commission files a formal complaint. A formal public hearing is then held before the commission or an "appointed Master." If misconduct is established at that hearing, the commission must submit its decision and a recommendation for discipline to the Michigan Supreme Court (that the judge be censured, suspended with or without salary, or retired or removed from office). Upon review of the entire record, the Supreme Court may accept, reject, or modify the recommendation of the commission.

As to *confidentiality*, after a formal complaint is filed by the commission, the case becomes a matter of public record and subsequent pleadings and hearings are open to the public.

Minnesota: Board on Judicial Standards

The Minnesota Constitution [Article 6, Section 9] authorizes the Legislature to "provide for the retirement, removal, or other discipline of any judge who is disabled, incompetent, or guilty of conduct

prejudicial to the administration of justice.” *The Legislature has authorized the Minnesota Supreme Court to discipline judges.* The 1971 Legislature created the Board on Judicial Standards to assist the Court in this task and authorized the Supreme Court to make rules to implement judicial discipline. [ss. 490A.01 and .02, Minn. Stats.] In addition to the statutes, the Minnesota Supreme Court has adopted the Code of Judicial Conduct to govern judicial ethics.

The board has **10 members**: one judge from the Court of Appeals; three trial court judges; two lawyers who have practiced law in Minnesota for at least 10 years; **and four** citizens who are not judges, retired judges, or attorneys. All members are appointed by the Governor and, except for the judges, require confirmation by the State Senate.

The board has the **authority** to investigate allegations of judicial misconduct or, on its own motion, inquire into the conduct of a judge. Upon a finding of reasonable cause, the board may issue private letters of caution, private admonitions, propose public reprimands, or commence a public hearing. The rules also permit the board to defer a disposition, impose conditions on a judge’s conduct, or require professional counseling or treatment. The board may, after a hearing, recommend to the Minnesota Supreme Court, that the Supreme Court censure the judge, or suspend, or remove the judge from office. Only the Supreme Court has the authority to impose those sanctions.

As to **confidentiality**, all proceedings of the board are confidential until a formal complaint and response have been filed with the Supreme Court. A judge under investigation may waive personal confidentiality at any time during the proceeding.

FEDERAL COURT: LAWS RELATING TO JUDICIAL DISCIPLINE OF FEDERAL JUDGES

Disciplinary Action: Impeachment

Under Article III, Section 1, of the U.S. Constitution, federal judges have lifetime tenure (“shall hold their offices during good behavior”) and may be removed from office only by **impeachment** by the House of Representatives (formal grounds are brought) and then prosecution and conviction by the Senate. Under Article II, Section 4, of the U.S. Constitution, grounds for impeachment are “Treason, Bribery, or Other High Crimes and Misdemeanors.” If convicted, the federal judge is then removed. In the history of the United States, the House has voted to impeach 13 federal judges, 11 of whom were tried and seven convicted in a trial before the Senate and removed from office. Impeachment and removal have, in almost all cases, been based on crimes, corruption or abuse of office. No federal judge has been removed based on his or her substantive content of his or her judicial opinions. [“Discipline Federal Court Judges,” CJA, at: <http://www.judicialaccountability.org/judicialaccountability4.htm>.]

Disciplinary Actions: Others; Procedures

The following excerpt from the article, “Federal Judicial Conduct,” American Judicature Society, 2009, http://www.ajs.org/ethic/eth_fed-jud-conduct.asp, succinctly summarizes the federal law relating to judicial discipline of federal judges:

Complaints against federal judges are filed under the **Judicial Conduct and Disability Act of 1980**, as amended. Under the Act, any person may file a written complaint alleging that a judge has

engaged in “conduct prejudicial to the effective and expeditious administration of the business of the courts” or “is unable to discharge all duties of office by reason of mental or physical disability.”

Complaints are filed with the chief judge of the court of appeals in the circuit in which the judge sits, through the clerk of the court. The chief judge may also “identify a complaint” in a written order stating reasons. After reviewing a complaint (and perhaps engaging in a limited inquiry), the chief judge either:

- Dismisses the complaint.
- Concludes the proceeding if corrective action has been taken.
- Appoints a special committee.

Most complaints are dismissed, and the most frequent ground for dismissing a complaint is that it is “directly related to the merits of a decision or procedural ruling,” grounds established by the Act. A complaint may also be dismissed if it lacks sufficient evidence to raise an inference that misconduct has occurred or contains allegations that are incapable of being established through investigation or if a limited inquiry demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence. A chief judge may also conclude a complaint upon finding that appropriate corrective action has been taken or that intervening events make action no longer necessary. See, <http://www.uscourts.gov>. The complainant can petition to the circuit judicial council for review if the chief judge dismisses a complaint or concludes a proceeding.

If a complaint is not dismissed, a special committee is appointed to investigate the allegations in the complaint and file a written report with the circuit judicial council. The judicial council may:

- *Dismiss the complaint.*
- *Certify the disability of a judge.*
- *Request that a judge voluntarily retire.*
- *Order that, on a temporary basis for a time certain, no further cases be assigned to a judge.*
- *Censure or reprimand the judge by private communication.*
- *Censure or reprimand the judge by public announcement.*
- *Order such other action as it considers appropriate under the circumstances.*

The complainant or the judge who is the subject of a complaint may petition the United States Judicial Conference for review of any action taken by a circuit judicial council. Federal judges cannot be removed under the Act, although the Judicial Conference can refer a complaint to the House of Representatives for consideration of impeachment.

In 1986, a special committee of the chief judges of the court of appeals formulated “Illustrative Rules Governing Complaints of Judicial Conduct and Disability,” which were revised in 2000. Most circuit councils adopted the “Illustrative Rules” verbatim or with slight modifications.

Based on the 2006 Report of the Judicial Conduct and Disability Act Study Committee (known as the Breyer Committee for its chair, Justice Stephen Breyer), the 2008 Rules for Judicial Conduct and Disability Proceedings adopted by the Judicial Conference replace the “Illustrative Rules,” providing mandatory, nationally uniform rules and superseding any conflicting judicial council rules although “councils may promulgate additional rules . . . as long as those rules do not conflict.” The new rules adopt many of the standards for evaluating complaints used by the Breyer Committee, including extensive discussion of statutory terms such as “corrective action,” “related to the merits,” and “conduct prejudicial to the effective and expeditious administration of the business of the courts.”

The new rules clarify under what circumstances a chief judge should exercise the statutory authority to “identify a complaint” and start an inquiry without waiting for a complaint to be filed. [Emphasis added.] [Sources: 16 U.S.C. [United States Code] ss. 351 to 364 (Complaints Against Judges and Judicial Discipline).]

Code of Conduct for United States Judges

As to what is ethical and permissible, federal judges follow the Code of Conduct for United States judges, a set of ethical principles and guidelines ***adopted by the Judicial Conference of the United States***. The Code of Conduct provides guidance for judges on issues of: (1) judicial integrity and independence; (2) judicial diligence and impartiality; (3) permissible extra-judicial activities; and (4) the avoidance of impropriety or even the appearance of impropriety. The code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges.

The ***Judicial Conference of the United States***’ principal objective is framing policy guidelines for administration of judicial courts in the United States. The conference derives its authority from 28 U.S.C. s. 331. The conference is chaired by the Chief Justice of the United States Supreme Court and also consists of the chief judge of each court of appeals, a district court judge from each regional judicial circuit, and the chief judge of the Court of International Trade.

DLS:ty

Enclosures