WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 1

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

FROM: Ronald Sklansky, Senior Staff Attorney

RE: Legislative and Judicial Authority

DATE: July 28, 2010

On May 7, 2010, the Wisconsin Legislative Council created the Special Committee on Judicial Discipline and Recusal. The committee was directed to:

1. Review the current method by which justices and judges are disciplined; examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and recommend a method by which justices and judges should be disciplined.

2. Review the current system of judicial recusal and recommend an objective standard for judicial recusal.

Before the Special Committee begins its deliberations, a threshold question from committee members may be whether the Legislature has any authority to act in matters that are so central to the operation of the judicial branch of government. This Memo addresses that question.

BACKGROUND

Separation of Powers

The Wisconsin Supreme Court has held that the state's three branches of government (legislative, judicial, and executive) exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of

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courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another."
>
> Each branch has a core zone of exclusive authority into which the other branches may not intrude....
>
> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." …The undue burden or substantial interference must be proven beyond a reasonable doubt…. [See *Id.*, 531 N.W.2d at 36, 40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

> ...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.
>
> If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch. [See *State v. Horn*, 226 Wis. 2d 637, 594 N.W.2d 772, 776-7 (1999); citations omitted.]

STATUTORY RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section. 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statues does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

DISCUSSION

Judicial Discipline

Any separation of powers question relating to legislative authority to consider judicial discipline has been answered by the Wisconsin Constitution. Wisconsin Constitution, Article VII, Section 11, provides in part:

> Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. [See also *Matter of Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485 (1980), *cert. denied* 449 U.S. 449-994, 101 S. Ct. 531.]

The Legislature clearly has the authority to consider the topic of judicial discipline and this is evidenced by the creation of the judicial commission and the regulation of its proceedings in ss. 757.81 to 757.99, Stats.

Recusal

It appears that the subject of judicial recusal is an area over which the legislative and judicial branches exercise shared power. For example, with respect to legislative enactments, s. 757.19, Stats., describes when a judge must disqualify himself or herself from any civil or criminal action or proceeding. A disqualification may be waived by agreement of all parties and the judge, but an alleged violation or abuse of the disqualification procedure must be referred to the Judicial Commission. [See also the related topic of judicial substitution in ss. 799.205, 800.05, 801.58, 938.29, and 971.20, Stats.]

As additional support for the notion that the Legislature shares power over the topic of judicial recusal, it can be noted that the Legislature has exercised this power both before and immediately after statehood. [One method of determining the meaning of a constitutional provision, in this case the unstated separation of powers doctrine, is to review the earliest interpretation of the document by the Legislature as manifested in the first law passed following its adoption. (See *Dairyland Greyhound*

Park, Inc. v. Doyle, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 (2006)).] The statutes of the territory of Wisconsin (1839) included a provision stating that:

> No judge of probate shall be allowed or admitted to have a voice in judging or determining, nor shall he be admitted to plead or act as attorney, in any civil action whatever, which may depend on, or have relation to any decree made or passed by him as such judge. [See, AN ACT, establishing courts of probate, defining their jurisdiction and powers, and directing the settlement of estates therein. (SEC. 22) Statutes of the Territory of Wisconsin (1839).]

The revised statutes of 1849 included the following provisions:

> "In case the judge of the circuit court shall be interested in any cause or causes pending in such court, or shall have acted as attorney, solicitor, or counsel for either of the parties thereto, the said judge shall not have power to hear and determine such cause or causes, except by consent of the parties thereto; and upon motion the said judge shall order a change of venue to an adjoining circuit, and the judge of said circuit shall hear and determine said cause or causes." [See, ch. 87, s. 20, Revised Statutes of 1849.]

The Wisconsin Supreme Court also has exercised its authority in this area, most recently in *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*, 2010 WI 73 (July 7, 2010). The amendments to the Code of Judicial Conduct relate to whether a judge is required to recuse himself or herself in a proceeding based solely on any endorsement, the judge's campaign committee's receipt of a lawful campaign contribution, or the sponsorship of an independent expenditure or issue advocacy communication. [Further, the court has treated the issue of recusal by amending a predecessor of s. 757.19, Stats. In a proceeding entitled "IN THE MATTER OF THE PROMULGATION OF RULES RELATING TO PLEADING, PRACTICE AND PROCEDURE IN THE COURTS OF THE STATE OF WISCONSIN," and citing s. 251.18, Stats. (a predecessor to s. 751.12, Stats., described above), the court amended s. 256.21, Stats., relating to judicial disqualification. (7 Wis. 2d v (1959)).]

In case of a conflict between legislative and judicial proposals regarding the shared power of judicial recusal, the final arbiter of course may be the Wisconsin Supreme Court. The Supreme Court can overturn legislative action either through future amendments to the statutes or, in a contested case, by determining, beyond a reasonable doubt, that the legislative action unduly burdens or substantially interferes with the authority of the judicial branch. [See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.]

RS:ty