



WISCONSIN LEGISLATIVE COUNCIL

JUDICIAL DISCIPLINE AND RECUSAL

Room 328 Northwest
State Capitol

November 18, 2010
1:00 p.m. – 3:15 p.m.

[The following is a summary of the November 18, 2010 meeting of the Special Committee on Judicial Discipline and Recusal. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at <http://www.legis.state.wi.us/lc>.]

Call to Order and Roll Call

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

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

COMMITTEE MEMBERS EXCUSED: Public Members Thomas Basting and Diane Diel.

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

<p>*ATTENTION: This was the final meeting of the Special Committee on Judicial Discipline and Recusal. Committee members are requested to send any corrections regarding these Minutes to the Legislative Council staff. After the incorporation of any corrections, these Minutes will be considered approved by the committee.</p>

Approval of the Minutes of the October 14, 2010 Meeting

The minutes of the committee's October 14, 2010 meeting were approved by unanimous consent.

Discussion of Committee Assignment

Memo No. 8

Chair Hebl explained that Memo No. 8, *Jurisdiction of the Office of Lawyer Regulation and the Judicial Commission*, was distributed to committee members and asked if committee members had questions about the Memo. Representative Kessler responded that he wanted to discuss the issue described in the Memo later in the meeting.

WLC: 0010/1

Ms. Karls-Ruplinger explained WLC: 0010/1, relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability.

Judge Davis explained that the draft is unneeded tinkering and that it is outrageous to discipline a judge if a majority of the Supreme Court does not decide to discipline.

Mr. Laufenberg moved, seconded by Ms. Kaminski, that the committee recommend WLC: 0010/1, relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability, to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion failed on a vote of Ayes, 5 (Reps. Hebl and Kessler; and Public Members Hurley, Kaminski, and Laufenberg); Noes, 5 (Sen. Grothman; Rep. LeMahieu; and Public Members Cross, Davis, and Schultz); and Absent, 2 (Public Members Basting and Diel).

WLC: 0011/1

WLC: 0011/1 was taken up first at the request of Representative Kessler. Ms. Karls-Ruplinger explained WLC: 0011/1, relating to a panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration).

Representative Kessler explained that the "by seniority" language in the draft is not clear enough and that the panel should be the three most senior court of appeals judges. Mr. Cross agreed and suggested that the panel be composed of the three most senior judges, based upon days of service. Mr. Hurley asked whether the panel should be appointed by lot. Representative Kessler responded that he does not want the panel appointed by lot. Mr. Cross suggested that appointment by lot opens the process up to possible tampering.

Mr. Laufenberg asked what would happen if a judge could not sit on the panel. Representative Kessler opined that the appointment would go to the next most senior judge if there was a conflict or recusal. Mr. Sklansky responded that under the draft, the procedure is established by the Legislature. Mr. Schultz noted that it is odd to not allow a Supreme Court justice to have his or her case heard by the Supreme Court when every other litigant can have his or her case heard by the Supreme Court. Ms.

Kaminski asked what is meant by “eligible to be appointed” in the draft. Mr. Cross responded that it accounts for judges who recuse themselves.

Mr. Hurley explained that the committee should recognize that the Supreme Court will interpret the language and that the language should be specific. Chair Hebl expressed concern about the draft because the Supreme Court does not want judicial discipline taken out of the court’s auspices. Judge Davis reminded the committee that Supreme Court justices are subject to discipline by the Legislature. Mr. Cross noted that impeachment is the ultimate sanction and that there should be discipline options in the middle. Representative Kessler agreed, stating that there should be middle ground options for discipline. Mr. Hurley described a public perception that the judicial system is not fair and highlighted the need for a mechanism involving review and fair treatment.

Mr. Laufenberg asked about the process for adoption of a constitutional amendment. Mr. Sklansky responded that a joint resolution must be adopted by two successive Legislatures, followed by approval by the electorate. Mr. Laufenberg noted that the draft is not an immediate solution.

Judge Davis explained that Supreme Court justices are subject to rules of professional conduct for attorneys and the state Ethics Code. He also noted that Supreme Court justices are subject to election and impeachment and that the apexes of the executive, legislative, and judicial branches are treated similarly.

Mr. Schultz noted that under the draft, up to six court of appeals judges could be involved in the discipline process. Judge Davis asked why the decision-maker is not the full court of appeals, rather than the three most senior court of appeals judges. Representative Kessler responded that it would be cumbersome to get all court of appeals judges together and that wisdom comes with seniority.

Mr. Schultz asked whether a proposed constitutional amendment could be amended in the legislative process. Mr. Sklansky responded that the joint resolution could be amended on its first consideration in the Legislature but not on its second consideration. Ms. Kaminski noted that the draft gives voters an opportunity to vote on the constitutional amendment.

Judge Davis asked why the Supreme Court is required to appoint the panel when the selection is automatic. Representative Kessler responded that the act of appointing the panel is a ministerial act.

Mr. Cross moved, seconded by Representative Kessler, to amend the language on line 12 of WLC: 0011/1, relating to a panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration), to read: “a panel of the 3 most senior judges of the court of appeals, based upon days of service, who are eligible to.” The motion passed on a vote of Ayes, 9 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Davis, Hurley, Kaminski, Laufenberg, and Schultz); Noes, 1 (Sen. Grothman); and Absent, 2 (Public Members Basting and Diel).

Representative Kessler moved, seconded by Mr. Cross, that the committee recommend WLC: 0011/2 (the amended version of WLC: 0011/1), relating to a panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration), to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion failed on

a vote of Ayes, 5 (Reps. Hebl and Kessler; and Public Members Cross, Hurley, and Kaminski); Noes, 5 (Sen. Grothman; Rep. LeMahieu; and Public Members Davis, Laufenberg, and Schultz); and Absent, 2 (Public Members Basting and Diel).

WLC: 0012/1

Ms. Karls-Ruplinger explained WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration).

Mr. Cross asked what it means for the committee to approve WLC: 0011/2 and WLC: 0012/1, if only one of the constitutional amendments is needed. Representative Kessler responded that the committee should approve both drafts because the drafts must still be approved by the Joint Legislative Council. Representative Kessler also noted that this draft applies to disciplinary proceedings for all judges.

Mr. Cross moved to amend the sentence beginning on line 15 of WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration), to read: "The person assigned shall be the most senior judge of the court of appeals, based upon days of service, who is eligible to be assigned." The amendment was approved by unanimous consent.

Mr. Laufenberg explained that the draft would give the Supreme Court authority to decide whether to appoint a court of appeals judge and that the Supreme Court should be required to make the appointment. He also noted that the more significant problem is the split on the court in judicial discipline cases.

Mr. Laufenberg moved, seconded by Mr. Cross, to replace "may" with "shall" on line 12 of WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration). The motion passed on a vote of Ayes, 8 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Hurley, Kaminski, Laufenberg, and Schultz); Noes, 2 (Sen. Grothman; and Public Member Davis); and Absent, 2 (Public Members Basting and Diel).

Judge Davis asked what is meant by "when it is necessary" in the draft. Ms. Karls-Ruplinger responded that the language is from a previously introduced bill and that the Supreme Court would decide when it is necessary to provide seven justices. Representative Kessler suggested that the committee remove the language "when it is necessary."

Judge Davis stated that if the Supreme Court has less than six justices to consider a case, it would have to appoint a court of appeals judge. Ms. Kaminski suggested that the draft provide for the appointment of a court of appeals judge to make an odd number of justices. Mr. Schultz stated that five or three justices would suffice. Mr. Sklansky reminded the committee that the Supreme Court needs four justices for a quorum. Mr. Hurley asked whether the draft should include the language "not less than 5." Judge Davis asked whether the quorum requirement is an internal rule of the Supreme Court. Ms. Karls-Ruplinger responded that the quorum requirement is a constitutional provision. Mr.

Laufenberg explained that if the quorum requirement is a constitutional provision, then the language “not less than 5” is not necessary.

Representative Kessler moved, seconded by Mr. Cross, to delete “when it is necessary” on line 14 of WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration). The motion passed on a vote of Ayes, 9 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Davis, Hurley, Kaminski, Laufenberg, and Schultz); Noes, 1 (Sen. Grothman); and Absent, 2 (Public Members Basting and Diel).

Mr. Cross asked whether the Supreme Court would appoint two court of appeals judges to get to five justices if only three justices remained to consider a judicial discipline case. Mr. Sklansky responded that the Supreme Court would need at least four justices to make the decision to appoint a court of appeals judge. Judge Davis asked whether the Supreme Court has not had enough justices to vote in a discipline case. Mr. Sklansky responded that he was aware of cases in which the Supreme Court had six justices to consider a discipline case and the decision was not evenly divided. Judge Davis noted that the constitutional amendment will not be used.

Ms. Kaminski moved, seconded by Mr. Laufenberg, to replace “7” with “an odd number of” on line 14 of WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration). The motion passed on a vote of Ayes, 7 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Hurley, Kaminski, and Laufenberg); Noes, 3 (Sen. Grothman; and Public Members Davis and Schultz); and Absent, 2 (Public Members Basting and Diel).

Representative Kessler moved, seconded by Mr. Laufenberg, that the committee recommend WLC: 0012/2 (the amended version of WLC: 0012/1), relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration), to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion passed on a vote of Ayes, 6 (Reps. Hebl and Kessler; and Public Members Cross, Hurley, Kaminski, and Laufenberg); Noes, 4 (Sen. Grothman; Rep. LeMahieu; and Public Members Davis and Schultz); and Absent, 2 (Public Members Basting and Diel).

WLC: 0005/1

Mr. Sklansky explained WLC: 0005/1, relating to judicial disqualification based on an objective standard.

Judge Davis asked for information on how the objective standard works at the federal level. Mr. Salm responded that after researching the issue, he was not able to find any information for the committee. Judge Davis suggested that the draft use the objective standard from the Code of Judicial Conduct, instead of federal law.

Mr. Cross asked whether “might reasonably be questioned” is defined. Mr. Sklansky responded that the legal system is familiar and experienced with reasonableness standards. Judge Davis explained that there are many unreasonable challenges to a judge’s impartiality.

Representative Kessler suggested that the draft use the Code’s objective standard. Mr. Schultz explained that the Code’s language could be shortened. Judge Davis expressed concern about shortening the language of the objective standard in the Code.

Judge Davis moved, seconded by Representative Kessler, to replace the language on line 4 of WLC: 0005/1, relating to judicial disqualification based on an objective standard, with the following language: “When reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.” The motion passed on a vote of Ayes, 8 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Davis, Kaminski, Laufenberg, and Schultz); Noes, 2 (Sen. Grothman; and Public Member Hurley); and Absent, 2 (Public Members Basting and Diel).

Judge Davis noted that he does not recall any testimony regarding problems with trial court judges. Mr. Hurley described a situation in which a prosecutor was married to a judge and its effect on the public perception of justice. Judge Davis asked whether the ability to substitute a judge in circuit court is a remedy. Mr. Laufenberg explained that an objective standard addresses issues of public perception by providing meaningful review of a judge’s recusal decision.

Mr. Laufenberg moved, seconded by Ms. Kaminski, that the committee recommend WLC: 0005/2 (the amended version of WLC: 0005/1), relating to judicial disqualification based on an objective standard, to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion failed on a vote of Ayes, 5 (Reps. Hebl and Kessler; and Public Members Kaminski, Laufenberg, and Schultz); Noes, 5 (Sen. Grothman; Rep. LeMahieu; and Public Members Cross, Davis, and Hurley); and Absent, 2 (Public Members Basting and Diel).

WLC: 0008/1

Mr. Sklansky explained WLC: 0008/1, relating to notice of campaign contributions made to a judge.

Mr. Cross asked whether the draft only applies during an election cycle. Mr. Sklansky responded that the focus of the draft is on the pendency of an action and that if a contributor makes a contribution during the pendency of an action, then notice is required. Ms. Kaminski suggested that the draft is in response to the solicitation of contributions by justices and judges. Mr. Sklansky noted that the draft is in response to Justice Bradley’s comments about the practice of justices and judges soliciting contributions from litigants appearing in front of them. Ms. Kaminski asked whether justices and judges may solicit contributions. Mr. Sklansky responded that judicial campaigns may solicit, but that justices and judges may not personally solicit.

Mr. Hurley noted that information about contributions is available online and asked why the litigant has the obligation to make a notice. Judge Davis responded that a notice requirement for judges would be an administrative burden. Mr. Hurley noted the burden in a large law firm of having to check on contributions of other attorneys and their spouses. Mr. Sklansky explained that the Code of Judicial Conduct sets up the judicial campaign committees to create separation between a judge and his or her campaign and that the campaign, not the judge, would be immediately aware of contributions. Judge Davis emphasized that campaign contributions are already reported and are public record. Mr. Cross noted that the draft make contributions more open. Ms. Kaminski explained that a party is asked to disclose because a judge does not know that the contribution has been made.

Ms. Kaminski moved, seconded by Mr. Cross, that the committee recommend WLC: 0008/1, relating to notice of campaign contributions made to a judge, to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion failed on a vote of Ayes, 4 (Reps. Hebl and Kessler; and Public Members Cross and Kaminski); Noes, 5 (Sen. Grothman; Rep. LeMahieu; and Public Members Davis, Laufenberg, and Schultz); Not Voting, 1 (Public Member Hurley); and Absent, 2 (Public Members Basting and Diel).

WLC: 0013/1

Mr. Sklansky explained WLC: 0013/1, relating to judicial disqualification based on campaign financial support.

Judge Davis asked why the draft does not apply to Supreme Court justices. Mr. Sklansky responded that “judge” in the draft includes Supreme Court justices. Mr. Laufenberg explained that if WLC: 0005/2 is adopted, there is no need to consider this draft. Ms. Kaminski asked whether there is a way to communicate to the Joint Legislative Council that one draft is preferred over another. Mr. Sklansky responded that the committee can have two alternatives presented to the Joint Legislative Council, but that the committee report will not indicate that one is preferred over another.

Ms. Kaminski stated that she would include a broad definition of “party” in the draft, have the draft apply to contributions in the previous six years, have the draft apply to non-judicial elections in addition to judicial elections, and include a \$5,000 threshold. Judge Davis suggested that different thresholds be considered for different judicial races.

Judge Davis moved, seconded by Representative Kessler, that the committee table WLC: 0013/1, relating to judicial disqualification based on campaign financial support. The motion passed on a vote of Ayes, 9 (Reps. Hebl, Kessler, and LeMahieu; and Public Members Cross, Davis, Hurley, Kaminski, Laufenberg, and Schultz); Noes, 1 (Sen. Grothman); and Absent, 2 (Public Members Basting and Diel).

WLC: 0014/1

Mr. Sklansky explained WLC: 0014/1, relating to the authority of the supreme court to review a decision of a justice to deny a motion to disqualify the justice.

Judge Davis asked whether the draft involves an issue of shared power. Mr. Sklansky responded that the draft could be classified as a matter of procedure, but that the court may argue that it falls within its inherent powers. Judge Davis noted that the Supreme Court could disqualify a justice, and the disqualified justice would have no way to appeal the decision. Mr. Hurley stated that there is an inherent problem with judges judging judges. Judge Davis responded that judges should be judging judges because judges are qualified and experienced as judges. Mr. Hurley explained that, other than judges and attorneys, members of other professions do not judge members of the same profession.

Ms. Kaminski asked why “may” is used in the draft, instead of “shall.” Mr. Sklansky responded that it provides discretion to the Supreme Court. Judge Davis stated that a party may not want a review of a recusal decision.

Mr. Cross moved, seconded by Mr. Hurley, that the committee recommend WLC: 0014/1, relating to the authority of the supreme court to review a decision of a justice to deny a motion to disqualify the justice, to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion failed on a vote of Ayes, 5 (Rep. Hebl; and Public Members Cross, Kaminski, Laufenberg, and Schultz); Noes, 5 (Sen. Grothman; Reps. Kessler and LeMahieu; and Public Members Davis and Hurley); and Absent, 2 (Public Members Basting and Diel).

WLC: 0018/1

Mr. Sklansky explained WLC: 0018/1, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification.

Mr. Hurley stated that the draft should include a 60-day requirement and that the public deserves an explanation of a denial of a recusal motion. Judge Davis explained that an explanation requires that a judge repeat illegitimate complaints. Mr. Laufenberg asked why the explanation occurs after the conclusion of a case. Mr. Sklansky responded that testimony indicated that it was important to have the explanation after the conclusion of a case so that the explanation does not create additional questions of prejudice. Mr. Cross noted that, in his experience, judges often give reasons for denying a recusal motion.

WLC: 0018/1, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification, was amended by unanimous consent to provide that a statement of reasons must be filed within 60 days after a final judgment or final order has been issued in the civil or criminal action or proceeding.

Mr. Hurley moved, seconded by Ms. Kaminski, that the committee recommend WLC: 0018/2 (the amended version of WLC: 0018/1), relating to filing a statement of reasons when a judge or justice denies a motion for disqualification, to the Joint Legislative Council for introduction in the 2011-12 Legislature. The motion passed on a vote of Ayes, 6 (Reps. Hebl and Kessler; and Public Members Hurley, Kaminski, Laufenberg, and Schultz); Noes, 4 (Sen. Grothman; Rep. LeMahieu; and Public Members Cross and Davis); and Absent, 2 (Public Members Basting and Diel).

Other Business

Mr. Cross proposed that the committee amend s. 757.19 (2) (a), Stats., to add “by blood, marriage, or adoption” after “kinship.” Judge Davis stated that he was not convinced such change was necessary and that it is his understanding that adoption is the same as birth for purposes of state law. Chair Hebl explained that he would work on a bill next session with Representatives LeMahieu and Kessler to address Mr. Cross’ request.

Representative Kessler proposed that the committee add “or any other person or agency, without the consent of the complainant” after “court commissioner” in s. 757.93 (1) (b), Stats. Chair Hebl explained that such request expands the scope of the committee. Representative LeMahieu suggested that Representative Kessler’s request be addressed by a separate bill next session.

Ms. Kaminski moved to discuss WLC: 0013/1. There was no second to her motion, so the committee did not discuss the draft.

Adjournment

The meeting was adjourned at 3:15 p.m.

JKR:ty:jb:wu;wu