WISCONSIN LEGISLATIVE COUNCIL

JUDICIAL DISCIPLINE AND RECUSAL

Room 328 Northwest
State Capitol

September 16, 2010
9:00 a.m. – 2:00 p.m.

[The following is a summary of the September 16, 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, Diane Diel, Stephen Hurley, Andrea Kaminski, and David Schultz.
COMMITTEE MEMBERS EXCUSED:	Public Members Thomas Basting and Lynn Laufenberg.
COUNCIL STAFF PRESENT:	Ronald Sklansky and Don Salm, Senior Staff Attorneys; and Jessica Karls-Ruplinger, Staff Attorney.
APPEARANCES:	Patience Roggensack, Justice, Wisconsin Supreme Court; Ann Walsh Bradley, Justice, Wisconsin Supreme Court; N. Patrick Crooks, Justice, Wisconsin Supreme Court; Shirley Abrahamson, Chief Justice, Wisconsin Supreme Court; Michael McCabe, Wisconsin Democracy Campaign; Mike Wittenwyler, Attorney, Godfrey & Kahn; Marla Stephens, Director, Appellate Division, Wisconsin State Public Defender's Office; Keith Findley, University of Wisconsin Law Center; and Professor Richard Esenberg, Marquette University Law School.

Approval of the Minutes of the August 5, 2010 Meeting

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

Presentations by Invited Speakers

Justice Patience Roggensack, Wisconsin Supreme Court

Justice Roggensack referred the committee to her written remarks for a more complete explanation of the U.S. Constitutional issues that are significant in any state's consideration of judicial recusal. She emphasized that she is concerned with maintaining the integrity of the Wisconsin Supreme Court, keeping in mind these constitutional concerns, adding that judicial bias cannot be presumed solely from a lawful campaign contribution, solely from a gubernatorial appointment, or solely from a lawful independent communication during the course of a judicial campaign.

Referring to the Court's recent revision of the Supreme Court Rules relating to recusal and campaign contributions and independent communications (enactment of s. SCR 60.04 (7) and (8)), Justice Roggensack noted that the Court narrowly tailored these provisions to meet the compelling state interest in unbiased judicial decision-making by listing lawful acts that, standing alone, were insufficient to require recusal.

Justice Roggensack noted that the fact that the petition for these changes came from two special interest groups and were adopted by the Court, almost verbatim, did not mean that they were not good petitions, adding that all petitioners are equal before the Court.

Justice Roggensack added that: (1) she is interested in seeing how the Legislature's recently enacted limit of $1,000 on individual contributions to judicial campaigns of justices will work before pondering further changes to judicial recusal rules; (2) the fact that Wisconsin has peremptory challenges for judges is of significant help on the recusal issue; and (3) she feels that the *Caperton* decision is unique on its facts and should have limited, if any, applicability to decision-making on recusal reforms in this state.

Justice Roggensack responded to questions from committee members.

Justice Ann Walsh Bradley, Wisconsin Supreme Court

Justice Bradley stated that there are very serious problems with future judicial elections, and elections in general, in light of the U.S. Supreme Court decision in *Citizens United*, referring to recent comments by former U.S. Supreme Court Justice Sandra Day O'Connor on the issue, and pointing to a recent report by the Brennan Center for Justice indicating that Wisconsin was second in expenditures in judicial campaigns in the United States. She noted that her primary concern is that the system cannot, under any circumstances, allow the active and knowing solicitation of contributions from litigants in court who are before that specific court.

Justice Bradley noted that she disagrees that the Wisconsin Legislature or Supreme Court is impeded from dealing with recusal issues by the First Amendment (U.S. Constitution) "right to vote" arguments, pointing out that her full discussion of that issue is found in her dissent to the recently

adopted recusal rules -- the right to vote does not mean that anyone has a right to have a certain judge sit on a certain case.

With reference to judicial discipline, Justice Bradley noted, that there is a significant problem when there is a deadlock at the Wisconsin Supreme Court level. She explained that in all other cases in which the Supreme Court deadlocks, the lower court decision stays in effect; that is, there is a mechanism available for finality in all cases but one, judicial discipline. She stated that ways to resolve this include: (1) bringing in a panel of lower appellate or circuit court judges, or a combination thereof, adding that she realized the tension placed on appellate judges, in particular, of sitting in judgment on someone who would be deciding their future cases brought up on appeal; and (2) having a jury trial *ab initio* (at the beginning of the recusal issue).

Justice Bradley stated that her reason for appearing was to comment on the recent changes in the Supreme Court Rules, relating to judicial recusal, especially the following underlined language in Rule 60.06 (4) (campaign contributions): "The committee is not prohibited from soliciting and accepting lawful campaign contributions from lawyers, other individuals, or entities even though the contributor may be involved in a proceeding in which the judge, candidate for judicial office, or judge-elect is likely to participate." She stated that her concern is that this language allows judges to knowingly solicit campaign contributions from parties on matters on the court calendar, noting that this is a new and very significant change to the long-standing judicial practice against knowingly soliciting campaign contributions from such parties. She stated that the committee should modify this result in s. 757.19, Stats., by inserting a requirement that if the judge knowingly solicits contributions from parties who will appear in front of the judge, he or she is required to recuse himself or herself from the case. She added that she also supports Justice Crooks changes (discussed later in the meeting) for an objective standard for recusals.

In response to questions from the committee, Justice Bradley indicated that she did not think the $1,000 individual campaign contribution limit in the Legislature's recently enacted judicial campaign finance law was a sufficient amount to run a judicial campaign. However, she commended the Legislature for attempting to deal with the problems caused by the U.S. Supreme Court decisions in *White* (free speech of judges during campaigns) and *Citizens United*. She explained that the answer lies in enacting meaningful and effective recusal laws without infringing on the First Amendment rights as set forth in those U.S. Supreme Court cases. She said there is no magic bullet to this problem.

Justice Bradley responded to questions from committee members.

Justice N. Patrick Crooks, Wisconsin Supreme Court

Justice Crooks said that an objective standard is needed in recusal cases in light of the *Caperton* case, noting that the arguments for such a standard and the specific language needed to incorporate this standard into the Wisconsin statutes [by adding sub. (2) (h) to s. 757.19 (2), Stats.] are fully set forth in his written remarks submitted to the committee.

Justice Crooks explained that this objective standard has been adopted by the U.S. Congress and by 48 of the 50 states, noting that current s. 757.19 (2) (g), Stats., sets forth a subjective standard, as best explained by the Wisconsin Supreme Court in *State v. American T.V. and Appliance of Madison, Inc.*, 151 Wis.2d 175, 182-183 (1989). He noted that currently the Wisconsin Code of Judicial Conduct, as set forth in the Supreme Court Rules, has an objective standard, but the statute, cited above, has a subjective standard, and that this disparity has to be resolved.

In response to a question from Chair Hebl regarding what would be the next step if a particular judge decides recusal in a case is not appropriate, Justice Crooks stated that the matter would probably be handled informally by conversations between the Chief Judge and the District Court Administrator. After that, the process is up to the committee to decide. Judge Davis commented that, in reality, this situation rarely happens and is most often the result of a party using recusal as an attack mechanism. Mr. Hurley asked how objective the federal "reasonable man" standard is currently and who would determine what is reasonable if Wisconsin were to adopt this language. Justice Crooks responded that the committee could decide to have another judge, the Judicial Commission, or a reviewing court decide reasonableness, adding that the reasonableness standard does not solve all the problems with recusals, but is a step in the right direction. He noted that the members of the Supreme Court have discussed whether this is a procedural (rather than a substantive) area in which the Legislature could act and decided that it is procedural. In response to a comment by Mr. Hurley that a State Constitutional amendment would resolve this issue "permanently," Justice Crooks responded that that would be the more definite route, but would also be the more difficult and time-consuming route to take.

Justice Crooks responded to additional questions from committee members.

Chief Justice Shirley Abrahamson, Wisconsin Supreme Court

Chief Justice Abrahamson noted that securing justice and safeguarding the right of every individual to have his or her dispute decided fairly and impartially are as essential to securing our democracy as any steps the nation has taken to protect itself from violent terrorism, adding that this security can be accomplished only by transparency and accountability in our justice system.

With reference to judicial discipline, Chief Justice Abrahamson stated that there are cracks in the current system, noting, for example, that problems will arise when a panel composed of court of appeals judges is appointed to sit in judgment of a court of appeals judge. She suggested that the committee consider that the panel in such instances be composed of circuit court judges or others. She said another issue relates to the lack of public input during the investigation stage and the secrecy in the Judicial Commission's internal proceedings, suggesting that one approach would be to allow interested persons to file amicus briefs with the commission during these proceedings.

Chief Justice Abrahamson noted that yet another significant issue occurs when there is an equally divided Supreme Court on a judicial discipline case. She noted that, in 1990, the Judicial Council studied this issue and offered to assist the Court in devising a procedure that would respond to the following concerns: (1) the absence of a quorum in the event four justices recuse themselves; (2) what happens if there is an equally divided Court when the Justice who is the subject of the discipline proceeding recuses himself or herself for any reason; (3) the appearance of impropriety when members of the Court sit in judgment of a professional peer whom they know well and work with on a daily basis; and (4) the burden on each individual Justice and on the Court as an institution when the Justices sit in judgment of a professional peer, especially a fellow Justice. She noted that the Court did not respond to this offer of assistance on these key issues.

Chief Justice Abrahamson suggested several statutory changes relating to discipline that the committee might want to consider, including: (1) establishing separate procedures for discipline of circuit court judges, court of appeals judges, and Supreme Court Justices; (2) limiting the scope of Supreme Court review of a panel's recommendation of facts or law; (3) providing only for jury decisions, not a panel decision, and limiting the scope of Supreme Court review; (4) allowing a jury decision after the court evenly divides; (5) adding a circuit court or court of appeals judge to the

Supreme Court for these cases to avoid an even number of Justices; (6) selecting, by lot, a Justice who will remove himself or herself to avoid an even number of Justices; and (7) establishing a separate "discipline tribunal" to decide all judicial discipline cases.

With reference to recusal or disqualification, Chief Justice Abrahamson noted that the reasons to deal with this issue now are: (1) the issue is not new and the need for a solution has become more pressing as the issue arises more often and in difficult circumstances; and (2) circumstances have changed, especially relating to campaign funding and campaign speech, increasing the likelihood for recusal based on these issues.

Chief Justice Abrahamson noted that there are three distinct bodies of law governing the grounds for recusal and the procedure for determining whether a judge is disqualified under each body of law:

(1) ***Due Process*** (the federal and state constitutional guarantees). The due process standard for requiring recusal is set forth in *Caperton*, an objective standard requiring recusal as a matter of due process when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." This test does not require actual bias. The procedure for recusal is that the challenged judge determines whether to recuse himself or herself. If the judge refuses to recuse, the question is whether the judge's decision to sit is reviewable or the litigant's rights cease when the judge decides to sit. If a judge's participation in the case is found to have violated due process, the consequence is that the judgment is void and there "is a do over."

(2) ***Section 757.19, Wisconsin Statutes***, setting forth the Legislature's list of mandatory grounds for recusal. She noted that the "significant weakness" in this statute is that it does not provide for recusal when the judge's impartiality may reasonably be questioned by an objective observer (no objective "reasonable man" standard). She noted that, like Justice Crooks, she thinks the statute needs to be amended to provide for an objective test: that a judge must disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned (see the federal statute and the Wisconsin Supreme Court Rule, and the *Caperton* decision indicating that, for recusal, a state may choose standards more rigorous than due process requires). The procedure for recusal under the statute appears to be the same as for recusal under due process: the challenged judge determines whether to recuse himself or herself. If the judge refuses to recuse, the question arises whether the judge's decision is final or whether it is reviewable. If a judge or Justice participates in a case in violation of the statute, Wisconsin court case law indicates that the consequence is that the judgment is void and there "is a do over."

(3) ***Code of Judicial Conduct***, providing the circumstances under which there is a violation of the Code if the judge fails to recuse. Supreme Court Rule 60.04 (4) provides an objective "reasonable man" standard that a judge, and justice, must recuse himself or herself "when reasonable, well-informed persons knowledgeable about judicial ethical standards and the justice system and aware of the facts and circumstances the judge know or reasonably should know would reasonably question the judge's ability to be impartial." She noted that this is the standard that Justice Crooks proposed to be added to s. 757.19, Stats. The procedures for judicial discipline under the code, created by the Legislature, are the same as those required for discipline; they overlap. The Wisconsin Constitution provides that "each justice or judge shall be subject to discipline by the supreme court pursuant to procedures established by the legislature by law." She explained that members of the Supreme Court have not challenged the power of the Court to impose discipline on a judge and a Justice for violating the Code, including suspension or removal for cause. Although a violation of the Code's recusal provision is grounds for judicial discipline: (1) discipline for violation of the code does not necessarily affect the validity of the

judgment in which the challenged judge participated; and (2) a judge may be disciplined for conduct that would not have required disqualification under the statutory provision, s. 757.19, Stats. (citing prior case law). She explained that a finding of an ethical violation under the code does not necessarily furnish relief to a party who has lost a case; and that amending s. 757.19, Stats., to provide for an objective standard might operate to give a party a remedy for a violation of the code.

Chief Justice Abrahamson concluded that she favors appointment of a commission by the Court to review the Wisconsin Code of Judicial Conduct in light of changes in the American Bar Association Model Code (the basis for the Wisconsin Code), but noted that the Court, by a 4 to 3 vote, decided not to appoint a commission to study the entire code. She said that this request was prompted, in part, by the recent revisions in the Code of Judicial Conduct, including revision of s. SCR 60.04 (7) and (8), relating to endorsements and campaign contributions.

Chief Justice Abrahamson responded to questions from committee members.

Mike McCabe, Wisconsin Democracy Campaign

Mr. McCabe noted that the Wisconsin Supreme Court's recent amendments to the Code of Judicial Conduct allow judges to decide cases involving their biggest campaign supporters and is wrong because of who wrote the amendments (two of the state's most powerful lobbying groups, Wisconsin Manufacturers and Commerce and the Wisconsin Realtors Association); and wrong because it is contrary to the latest jurisprudence in this area, namely that set forth in the *Caperton* case, because Wisconsin's new rules conflict with *Caperton* by providing that no campaign donation, no matter how large, and no election spending, no matter how great, requires a judge or justice to recuse.

Mr. McCabe suggested that the state needs to do four things: (1) establish an objective standard for recusal, specifically spelling out the level of campaign support, either in the form of contributions to campaigns or election spending on behalf of a judge, that "triggers obligatory recusal," adding that recusal should no longer be discretionary in these cases; (2) create a procedure for independent review of petitions for recusal made by counsel for plaintiffs or defendants; (3) require the reasons for a judge's disqualification to be made public; and (4) create serious consequences for failure to recuse in cases involving campaign supporters and similar conflicts of interest. He indicated that he agreed with the other changes suggested by Chief Justice Abrahamson and Justice Crooks.

Mr. McCabe noted that in the area of campaign contributions, there should be a bright-line test for higher judicial offices, but that perhaps lower level courts could have a different standard. In response to a question from Mr. Cross as to where to draw the "bright-line," he said that although the League of Women Voters set that line at $1,000 in its petition to the Supreme Court, based on some polling he had done, he felt that $10,000 would be more reasonable. He added that it is also necessary to look at the proportions of support, noting that there is a different issue where, for example, all members of a particular union or law firm or other group contribute $1,000. He noted that one has to look at the percentage participation from a group, noting, for example, that in *Caperton*, half of all of the funding of judge-candidate Benjamin came from the defendant. Mr. Cross commented that there is a problem of gamesmanship, with some giving money to get a judge off a case and some giving money to all judges in an appellate case. He added that the League of Women Voters' suggestion that if one side has given $1,000 to the judicial candidate, the other side can waive recusal deals with this gamesmanship issue to an extent.

Mr. McCabe responded to questions from committee members.

Mike Wittenwyler, Attorney, Godfrey & Kahn

Mr. Wittenwyler noted that the Supreme Court's recent amendments to the Code of Judicial Conduct dealt with campaign contributions and independent spending because of the recent controversies over those issues and the increasing number of requests for recusals related to these areas. He said that Wisconsin Manufacturers and Commerce and the Wisconsin Realtors Association decided that "enough was enough" in these areas and that, in light of *Caperton* and other cases, it was time for the Supreme Court to take some action in these areas to clarify that campaign contributions and campaign spending on their own were not enough to force recusal. He explained that the amendments were consistent with *Caperton*, which was a case of very, very extraordinary facts that required, based on due process principles, that a justice be taken off of a case.

Mr. Wittenwyler explained that there now exists, based on *Caperton*, a process to do something if there is a refusal to recuse by a justice. As in *Caperton*, the process is to go to the federal courts. He added that *Caperton* requires each state to develop its own guidelines as to what the process is specifically. He recommended that the Legislature do what the Supreme Court did and specify that campaign contributions cannot be the sole reason for a recusal. He said that if the Legislature were to set guidelines on contributions, that would be a constitutionally prohibited ban on free speech. Under *Caperton*, it is necessary to look at the facts and circumstances of each case to see if due process has been violated.

Mr. Wittenwyler responded to questions from committee members.

Marla Stephens, Director, Appellate Division, Wisconsin State Public Defender's Office

Ms. Stephens stated that the State Public Defender's Office recommends the following changes relating to recusal:

1. Adopting an objective standard to determine when a judge's impartiality might reasonably be questioned, the standard found in 28 U.S.C. s. 455 (a) of the United States Code.

2. Eliminating the system's reliance upon the challenged judge to make the fitness determination, a reliance that undermines public confidence in the impartiality of the judicial process. She noted that this can be accomplished in several ways. The challenged judge may be limited to two options, either grant the request or send it to the chief judge of the administrative district for determination. The chief judge may then either decide the request or refer it to another judge or body for resolution or to make a recommendation to the chief judge. For example, the chief judge may: (a) choose one or an odd number of retired justices by lot; (b) impanel a recusal review board; or (c) request the Government Accountability Board to do this.

3. Adopting procedures for review of decisions concerning disqualifications of appellate court judges, including requiring a justice to render a recusal decision in writing.

4. Allow for the replacement of a justice who is recused, disqualified, or incapacitated.

Ms. Stephens responded to questions from committee members.

Keith Findley, University of Wisconsin Law Center

Professor Findley noted that his remarks would be limited to who should decide the recusal question in the case of a challenged Supreme Court Justice where any of the listed objective standards under s. 757.19, Stats., apply. He said the question is whether, in these so-called "easy cases," a single justice should decide (namely, the challenged justice) or the full Court should have to decide. He stated that the answer should be that where there is a specified objective standard, the recusal decision must be made by others and that, after the *Caperton* case, due process requires review by others where there is an objective standard.

Professor Findley responded to questions from committee members.

Professor Richard Esenberg, Marquette University Law School

Professor Esenberg stated that the committee should decide to do less rather than more on the recusal issue, noting that Wisconsin has long-since decided that election of judges is the preferred method for placing persons on the bench and that accountability to the voters is the necessary check on judges' actions in this state. He explained that recent U.S. Supreme Court cases have indicated that judicial candidates and judges have a robust right to speak their mind on a variety of topics (the *White* decision) and that people have a right to come together and pool their resources in making campaign contributions to judges, among others (the *Citizens United* decision). He explained that aggressively mandated rules, relating to recusals and campaign expenditures, are potential burdens on free speech rights. He noted that the very unusual fact situation in the *Caperton* case gives little reason to change the rights set forth in these other cases and to adopt an aggressive mandate relating to judicial recusal.

Professor Esenberg suggested that what the Wisconsin Supreme Court did in its recent amendments to the Judicial Code of Conduct was the right thing to do in response to the ever-increasing numbers of recusal requests. He noted that, as to campaign contributions, only those that are extraordinary and disproportionate should be a basis for recusal, and that these contributions should not be counted in the aggregate, but by the individual person, and that the contributing person or entity must be a party to the case. He concluded that the recent concerns about recusals is "a solution in search of a problem."

Professor Esenberg responded to questions from committee members.

Discussion of Committee Assignment

Chair Hebl directed the attention of the committee to the following Memos prepared by the staff:

- Memo No. 4, *Judicial Disqualification and Recusal* (September 9, 2010).
- Memo No. 5, *Disqualification of Judges Under Federal Law and the Due Process Clause* (September 9, 2010).
- Memo No. 6, *Overview of Judicial Recusal Laws and Procedures in the 50 States; Discussion of General Proposals from Other States' Laws and Legislation* (September 9, 2010).

Other Business

The committee will meet again on ***Thursday, October 14, 2010, at 1:00 p.m., in Room 328 Northwest, State Capitol, Madison***.

Adjournment

The meeting was adjourned at 2:00 p.m.

DLS:ty