SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND RECUSAL

March 18, 2011

PRL 2011-08
Special Committee on Judicial Discipline and Recusal

Prepared by:
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March 18, 2011

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PART I

KEY PROVISIONS
OF COMMITTEE RECOMMENDATIONS

The Special Committee on Judicial Discipline and Recusal recommends the following bill drafts to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature.

**LRB-1326/1, Relating to Filing a Statement of Reasons When a Judge or Justice Denies a Motion for Disqualification**

Current law provides that when a judge or justice is disqualified, the judge or justice must file in writing the reasons for the disqualifications.

LRB-1326/1 provides that a judge or justice also must file in writing the reasons for denying a motion to disqualify the judge or justice. The statement must be filed within 60 days after the conclusion of a civil or criminal action or proceeding.

**LRB-1327/1, Relating to Temporary Service by a Court of Appeals Judge in the Supreme Court in Judicial Disciplinary Proceedings (first consideration)**

Article VII, Section 11 of the Wisconsin Constitution provides that justices and judges are subject to reprimand, censure, suspension, removal for cause or for disability, by the Wisconsin Supreme Court pursuant to procedures established by the Legislature. Article VII, Section 4 (3) of the Wisconsin Constitution prohibits the temporary appointment of a Court of Appeals judge or Circuit Court judge to the Supreme Court.

The Judicial Commission is charged with investigating the alleged misconduct or permanent disability of a judge. If the Judicial Commission finds probable cause that a judge is engaging or has engaged in misconduct, it files a formal complaint with the Supreme Court. If the Judicial Commission finds probable cause that a judge has a permanent disability, it files a petition with the Supreme Court.

After the Judicial Commission finds probable cause of misconduct or permanent disability and before it files a complaint or petition, the matter is heard by a panel consisting of either three Court of Appeals judges or two Court of Appeals judges and one reserve judge or by a jury. The Supreme Court reviews the findings of fact, conclusions of law, and recommendations submitted following the hearing and determines appropriate discipline or action.

LRB-1327/1 is a proposed constitutional amendment, proposed to the 2011 Legislature on first consideration, that requires that the Supreme Court assign on a temporary basis a Court of Appeals judge to aid in the proper disposition of judicial disciplinary proceedings in the Supreme Court to provide an odd number of justices for the consideration of the proceedings. The person assigned must be the most senior Court of Appeals judge eligible to be assigned.

A proposed constitutional amendment requires adoption by two successive Legislatures, and ratification by the people, before it can become effective.
PART II
COMMITTEE ACTIVITY

Assignment

The Joint Legislative Council established the Special Committee on Judicial Discipline and Recusal and appointed the chairperson by a May 7, 2010 mail ballot. The committee was directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

Membership of the Special Committee was appointed by a June 30, 2010 mail ballot. The final committee membership consisted of one Senator, three Representatives, and eight public members. A list of committee members is included as Appendix 3 to this report.

Summary of Meetings

The Special Committee held four meetings on the following dates:

- August 5, 2010
- September 16, 2010
- October 14, 2010
- November 18, 2010

At the August 5, 2010 meeting, the Special Committee heard testimony from several speakers about the current system by which justices and judges are disciplined. Testimony also included a discussion of whether the current system should be changed and the impact of changes to the current system. The speakers were Justices Patience Roggensack and N. Patrick Crooks, Wisconsin Supreme Court; James Alexander, Executive Director, Wisconsin Judicial Commission; and Mike McCabe, Wisconsin Democracy Campaign.

At the September 16, 2010 meeting, the Special Committee heard testimony from several speakers about the current system of judicial recusal. Testimony also included a discussion of whether the current system should be changed and the impact of changes to the current system. The speakers were Chief Justice Shirley Abrahamson and Justices Patience Roggensack, Ann Walsh Bradley, and N. Patrick Crooks, Wisconsin Supreme Court; Mike McCabe, Wisconsin Democracy Campaign; Mike Wittenwyler, Attorney, Godfrey and Kahn; Marla Stephens, Director, Appellate Division, Wisconsin State Public Defender’s Office; Keith Findley, University of Wisconsin Law Center; and Richard Esenberg, Professor, Marquette University Law School.

At the October 14, 2010 meeting, the Special Committee held a public hearing on judicial discipline and recusal and heard testimony from the following speakers: Melanie Ramey, League of Women Voters of Wisconsin; Andrew Cook, Wisconsin Civil Justice Council, Inc.; and John Robinson, Justice at Stake. The committee also discussed legislative options regarding judicial discipline and recusal and requested that some of the options be prepared as bill drafts for further committed discussion.

At the November 18, 2010 meeting, the Special Committee discussed the following bill drafts:

- WLC: 0010/1, relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability.
• WLC: 0011/1, relating to panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration).

• WLC: 0012/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration)

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

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

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

• 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.

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

The committee voted to recommend WLC: 0012/2, relating to temporary service by a court of appeals judge in the Supreme Court in judicial disciplinary proceedings (first consideration), and WLC: 0018/2, 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.
PART III
RECOMMENDATIONS INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

This part of the report provides background information on, and a description of, the drafts as recommended by the Special Committee on Judicial Discipline and Recusal.

The Special Committee was directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

LRB-1326/1, Relating to Filing a Statement of Reasons When a Judge or Justice Denies a Motion for Disqualification

Background

Current law provides that when a judge or justice is disqualified, the judge or justice must file in writing the reasons for the disqualifications.

The committee received testimony about the current law requirement that a judge or justice file reasons if he or she is disqualified. The committee recommended that such requirement also apply if a judge or justice denies a motion to disqualify the judge or justice.

Description

LRB-1326/1 provides that a judge or justice also must file in writing the reasons for denying a motion to disqualify the judge or justice. The statement must be filed within 60 days after the conclusion of a civil or criminal action or proceeding.

LRB-1327/1, Relating to Temporary Service by a Court of Appeals Judge in the Supreme Court in Judicial Disciplinary Proceedings (first consideration)

Background

Article VII, Section 11 of the Wisconsin Constitution provides that justices and judges are subject to reprimand, censure, suspension, removal for cause or for disability, by the Wisconsin Supreme Court pursuant to procedures established by the Legislature. Article VII, Section 4 (3) of the Wisconsin Constitution prohibits the temporary appointment of a Court of Appeals judge or Circuit Court judge to the Supreme Court.

The Judicial Commission is charged with investigating the alleged misconduct or permanent disability of a judge. If the Judicial Commission finds probable cause that a judge is engaging or has engaged in misconduct, it files a formal complaint with the Supreme Court. If the Judicial Commission finds probable cause that a judge has a permanent disability, it files a petition with the Supreme Court.

After the Judicial Commission finds probable cause of misconduct or permanent disability and before it files a complaint or petition, the matter is heard by a panel consisting of either three Court of
Appeals judges or two Court of Appeals judges and one reserve judge or by a jury. The Supreme Court reviews the findings of fact, conclusions of law, and recommendations submitted following the hearing and determines appropriate discipline or action.

The committee received testimony about the potential for equally divided decisions in the Supreme Court in cases of judicial discipline, especially in cases of judicial discipline involving a Supreme Court justice. The committee recommended modifications to current law to avoid equally divided decisions in judicial discipline proceedings.

**Description**

LRB-1327/1 is a proposed constitutional amendment, proposed to the 2011 Legislature on first consideration, that requires that the Supreme Court assign on a temporary basis a Court of Appeals judge to aid in the proper disposition of judicial disciplinary proceedings in the Supreme Court to provide an odd number of justices for the consideration of the proceedings. The person assigned must be the most senior Court of Appeals judge eligible to be assigned.

A proposed constitutional amendment requires adoption by two successive Legislatures, and ratification by the people, before it can become effective.
Appendix 1

Committee and Joint Legislative Council Votes

The following drafts were recommended by the Special Committee on Judicial Discipline and Recusal to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature.

Special Committee Votes

The Special Committee voted to recommend the following two drafts to the Joint Legislative Council for introduction in the 2011-12 Session of the Legislature. The votes on the drafts are as follows:

- LRB-1326/1, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification, failed 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). [WLC: 0018/1 subsequently became LRB-1326/1.]

- LRB-1327/1, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration), failed 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: 0012/1 subsequently became LRB-1327/1.]
### Joint Legislative Council

[Joint Legislative Council Members Who Selected and Appointed Committee and Its Membership]

#### Co-Chair
**FRED A. RISSE**  
*Senate President*  
100 Wisconsin Avenue, Unit 501  
Madison, WI 53703

**MARLIN D. SCHNEIDER**  
*Representative*  
3820 Southbrook Lane  
Wisconsin Rapids, WI 54494

#### Senators

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<td>President Pro Tempore</td>
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<td>SCOTT FITZGERAL</td>
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#### Representatives

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<th>Name</th>
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This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.
Joint Legislative Council

[Current Joint Legislative Council Members Receiving Committee Report]

SENATE MEMBERS

MARY LAZICH, Co-Chair
4405 South 129th Street
New Berlin, WI  53151

TIM CULLEN
3711 N. Spring Hill Drive
Janesville, WI  53545

ALBERTA DARLING
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River Hills, WI  53217

JON ERPENBACH
6150 Briggs Road
Waunakee, WI  53597

SCOTT FITZGERALD
Majority Leader
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PAM GALLOWAY
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Minority Leader
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DALE SCHULTZ
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Richland Center, WI  53581

LENA TAYLOR
1518 West Capitol
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ASSEMBLY MEMBERS

JOAN BALLWEG, Co-Chair
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PETER BARCA
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4326 Somerset Lane
Madison, WI  53711

JEFF FITZGERALD
Speaker
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Horicon, WI  53032

TAMARA GRIGSBY
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Milwaukee, WI  53210

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Speaker Pro Tempore
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Waukesha, WI  53189

JOHN NYGREN
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SANDY PASCH
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Whitefish Bay, WI  53217

SCOTT SUDER
Majority Leader
102 South 4th Avenue
Abbotsford, WI  54405

ROBIN VOS
960 Rock Ridge Road
Burlington, WI  53105

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.

Terry C. Anderson, Director, Legislative Council Staff
1 East Main Street, Suite 401, P.O. Box 2536, Madison, Wisconsin  53701-2536
Appendix 3

Judicial Discipline and Recusal

Representative Gary Hebl, **Chair**
515 Scheuerell Lane
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Representative Frederick Kessler
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Milwaukee, WI 53224

Thomas Basting
Midwest Mediation, LLC
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Madison, WI 53701-1766

Chief Judge Mac Davis
Waukesha County Courthouse
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Waukesha, WI 53188

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Madison, WI 53703

Lynn Laufenberg
Laufenberg Law Group, S.C.
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Milwaukee, WI 53214

Senator Glenn Grothman, **Vice-Chair**
151 University Drive 312-N
West Bend, WI 53095

Representative Daniel LeMahieu
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Cascade, WI 53011

Troy D. Cross, Asst. District Attorney
Carl Frederick Administration Bldg.
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Milwaukee, WI 53202-4699

Andrea Kaminski, Executive Director
League of Women Voters of Wisconsin
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Professor David Schultz
University of Wisconsin Law School
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Madison, WI 53706-1399

**STUDY ASSIGNMENT:** The Special Committee is directed to: (a) review the current method by which justices and judges are disciplined; (b) examine alternative methods of judicial discipline, including methods of judicial discipline in other states and in the federal court system; and (c) recommend a method by which justices and judges should be disciplined. The Special Committee is also directed to review the current system of judicial recusal and to recommend an objective standard for judicial recusal.

**12 MEMBERS:** 1 Senator; 3 Representatives; and 8 Public Members.

**LEGISLATIVE COUNCIL STAFF:** Don Salm and Ronald Sklansky, Senior Staff Attorneys; Jessica Karls-Ruplinger, Staff Attorney; and Tracey Young, Support Staff.
## November 18, 2010

- **WLC: 0005/1**, relating to judicial disqualification based on an objective standard.
- **WLC: 0008/1**, relating to notice of campaign contributions made to a judge.
- **WLC: 0010/1**, relating to equally divided decisions of the supreme court in cases of judicial misconduct or permanent disability.
- **WLC: 0011/1**, relating to a panel of court of appeals judges in disciplinary proceedings involving a supreme court justice (first consideration).
- **WLC: 0012/1**, relating to temporary service by a court of appeals judge in the supreme court in judicial disciplinary proceedings (first consideration).
- **WLC: 0013/1**, relating to judicial disqualification based on campaign financial support.
- **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.
- **WLC: 0018/1**, relating to filing a statement of reasons when a judge or justice denies a motion for disqualification.
- **Memo No. 8**, *Jurisdiction of the Office of Lawyer Regulation and the Judicial Commission*.

## October 14, 2010

- **Memo No. 7**, *Legislative Options Regarding Judicial Discipline and Recusal*, (October 7, 2010).
- **Testimony**, submitted by J. Adam Skaggs, Counsel, Democracy Program, Brennan Center for Justice.
- **Testimony**, submitted by Justice at Stake.
- **Memorandum**, from William K. Weisenberg, Chair, ABA Standing Committee on Judicial Independence, to ABA Entities and Affiliated Organizations (October 20, 2010), submitted at the request of Public Member Andrea Kaminski.
- **Handout**, Recommendations for Improving Judicial Disqualification Practices and Procedures Among the States, submitted at the request of Public Member Andrea Kaminski.
- **Letter**, submitted by Justice Patience Roggensack, Wisconsin Supreme Court.

## September 16, 2010

- **Memo No. 4**, *Judicial Disqualification and Recusal* (September 9, 2010).
- **Memo No. 5**, *Qualification of Judges Under Federal Law and the Due Process* (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).
- **Testimony**, Patience Roggensack, Justice, Wisconsin Supreme Court.
- **Testimony**, N. Patrick Crooks, Justice, Wisconsin Supreme Court.
- **Enclosure** to N. Patrick Crooks testimony.
- **Testimony**, Marla Stephens, Appellate Division Director, Office of the Wisconsin State Public Defender.
- **Memo**, to Doug Kammer, President, State Bar of Wisconsin, to Greg O’Meara, S.J., Chair, Criminal Law Section, *Request for State Bar Position on the Integrity of the Justice System*.
- **Board of Governors** adopts policy position reaffirming the essential role of defense attorneys in the criminal justice system, by Tom Solberg, State Bar of Wisconsin.
- **Testimony**, Chief Justice Shirley S. Abrahamson.
- **Testimony**, Ann Walsh Bradley, Justice, Wisconsin Supreme Court.
- **Testimony**, Wisconsin Democracy Campaign.
- **Memorandum** to Members of the Supreme Court, from Judicial Council (June 27, 1990).
- **Testimony**, Keith Findley, Clinical Professor, University of Wisconsin Law School.
August 5, 2010

- Memo No. 1, Legislative and Judicial Authority (July 28, 2010)
- Memo No. 2, Discipline and Removal of Justices and Judges under Wisconsin Law (July 28, 2010).
- Enclosure 1, a table outlining and comparing the key aspects of the investigating and adjudicating bodies in the states.
- Enclosure 2, several tables briefly outlining the available informal or private sanctions, and formal sanctions in the 50 states.