

MINUTES
(Unofficial until approved)
Judiciary Standards Committee
Supreme Court Conference Room
September 19, 2014

Members Present

Municipal Judge William Severin, Chair
Justice Daniel Crothers
Sen. Kelly Armstrong
Linda Bata
Judge Sonja Clapp
Daniel Dunn
Anna Frissell
Judge Richard Hagar
Rep. Diane Larson
Sen. David Oehlke
Tim Ottmar
Sheila Peterson
Judicial Referee Connie Portscheller
Judge Jay Schmitz

Members Absent

Judge Norman Anderson
Stacey Dahl
Joel Fremstad

Chair Severin called the meeting to order at 10:00 a.m. and drew Committee members' attention to the minutes of the March 21, 2014, meeting - meeting material, pp. 2-8.

It was moved by Rep. Larson, seconded by Sheila Peterson, and carried that the minutes be approved.

Judicial Improvement Program - Review Project Proposal - Further Discussion

Chair Severin reviewed the Committee's earlier consideration of the Supreme Court's referral of a Technical Assistance Review of the judicial improvement program conducted by a team from the National Center for State Courts (NCSC), a meeting with the NCSC team members, and the submission by the team members of a project proposal for further analysis and possible modifications to the judicial improvement program process. The project proposal, accompanied by cost estimates, was distributed for review by Committee members and on a majority vote the Committee declined to recommend the project proposal to the Supreme Court.

Chair Severin requested any further discussion related to the NCSC project proposal or possible alternatives.

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Staff explained that there are at least three general alternatives the Committee might consider: 1) conclude that the current judicial improvement program is working fairly well and recommend that no further action be taken, 2) recommend modifications in isolated areas identified in the Technical Assistance Review, such as a reminder process to increase response rate or adjustments to certain survey questions, or 3) reconsider the previous vote regarding the NCSC project proposal and select a part or parts of the project proposal to be pursued. He said there likely are other alternatives responses that could be considered.

Justice Crothers suggested another possible alternative may be to report that the NCSC Review was reviewed and a project proposal considered, but the Committee concluded that it would not be advisable to pursue the project. He said the Committee could also recommend that the State Court Administrator contact the UND Bureau of Governmental Affairs to determine whether the Bureau could assist with issues such as survey response rates, construction and format of particular survey questions, and other possible program improvements. He noted that the Bureau has been involved in survey development and the surveying process for many years.

Judge Schmitz said the suggestion is a reasonable way to proceed. Linda Bata agreed and observed that her preference is to use local institutions if they are available and can be helpful in addressing some of the identified issues.

After further discussion, it was moved by Justice Crothers, seconded by Sheila Peterson, and carried that the Committee report to the Supreme Court that it has completed its review of the NCSC Technical Assistance Review and project proposal and recommends that the proposal not be pursued and further recommends that the State Court Administrator be requested to contact the Bureau of Governmental Affairs and determine whether the Bureau can assist in review of the program's surveys, question formulation, possible methods for increasing response rates, and any other program improvements.

Judicial Disqualification - Supreme Court Referral

Chair Severin next drew attention to the Supreme Court's referral of an ABA House of Delegates policy urging adoption of judicial disqualification and recusal procedures concerning campaign financing in judicial elections. Also included in the referral: Resolution 8 of the Conference of Chief Justices likewise urging adoption of disqualification and recusal procedures and examples accompanying the resolution of disqualification and recusal provisions in other jurisdictions - Meeting material, pp. 26-50.

Chair Severin requested Committee discussion regarding how to proceed with review of the issues.

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Staff reviewed the Committee's earlier, preliminary discussion in 2009 and 2010 of judicial disqualification following the U.S. Supreme Court's opinion in *Caperton v. A.T. Massey Coal Co. Inc.* 556 U.S. 868 (2009). He said the Committee deferred action on the issue pending a then on-going review of judicial disqualification by the ABA Judicial Disqualification Project. The project, he said, did not result in any substantial results. A short discussion of the *Caperton* opinion is included in the background accompanying CCJ Resolution 8 - Meeting material, pp. 31-33. He said the CCJ Resolution encourages procedures that 1) take into account that certain campaign contributions may raise concerns regarding judicial impartiality and independence, 2) are transparent, 3) provide timely resolution of disqualification and recusal motions, and 4) include a method for timely review of denials to disqualify or recuse.

Justice Crothers explained that he had participated in the ABA's review of judicial disqualification issues as a member of a subcommittee of the ABA's Judicial Division. He said there were several attempts to craft acceptable rule language concerning disqualification but the efforts were ultimately unsuccessful. He said a resolution proposing rule language was withdrawn and there was subsequent agreement to work with the Conference of Chief Justices in developing a resolution to be considered by the conference, which resulted in Resolution 8.

With respect to judicial disqualification in North Dakota, staff explained that N.D.C.C. §29-15-21 governs demands for change of judge and establishes a process by which a party may remove a judge from a particular case. He said Rule 2.11 of the Code of Judicial Conduct governs, as an ethical matter, situations in which a judge is required to disqualify from a case if certain criteria are in play. He noted that the examples of disqualification provisions in other states in the meeting material generally apply to trial courts; there are few provisions that govern disqualification by the jurisdictions highest court, e.g., a Supreme Court. He said the Committee, in earlier reviews of the Code of Judicial Conduct, has considered and rejected ABA model rule provisions requiring disqualification if a judge knows that lawyers appearing before the judge have contributed a certain amount to the judge's election campaign. He noted that under current rules soliciting or accepting contributions on behalf of a judicial candidate is handled through a campaign committee and that information is not shared with the candidate.

Justice Crothers said one difficulty in devising a uniform rule regarding disqualification is that methods of judicial selection vary across the states. In some states, he said, judicial elections are very partisan, political races; in other states, an appointment and retention process is used; and in states, such as North Dakota, judges are elected on a non-partisan ballot. Another issue, he said, is in determining whether the matter relates to ethics or procedure. He said if the principal consideration is a procedure for disqualification, then there is a question of whether Rule 2.11 of the Code of Judicial Conduct is the appropriate place to address the issue. He explained that the ABA

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model rule language regarding disqualification based on knowledge of campaign contributions has been adopted in only three states and rejected or not adopted in forty-three states.

Judge Severin said the Committee may not be well-positioned to change the statutory procedure for change of judge set out in N.D.C.C. §29-15-21.

Justice Crothers agreed and observed that the change of judge statute is mainly in play at the beginning of a case and it applies only to the trial courts. A question then arises, he said, regarding how or whether to address an issue related to campaign contributions that surfaces in a case is pending during an election.

Sheila Peterson said it is beneficial that a judicial candidate does not know the identity of those who have contributed to the candidate's election effort. She wondered whether there is an issue to be addressed in light of the state's non-partisan election of judges, the fact that the candidate is generally unaware of the sources of campaign contributions, and the care taken in establishing campaign committees to handle contribution activity.

Justice Crothers noted that judicial candidates must file a campaign disclosure statement, which is accessible on the Secretary of State's website. Theoretically, he said, it may be possible that a candidate may review the details of the statement.

In response to a question from Rep. Larson, Justice Crothers said campaign contributions are not received directly by the candidate, they are given to the campaign committee.

Linda Bata agreed the current process seems to be working well but observed that the state is changing and more economic development is occurring. She said there may be an issue that would require attention in the future.

Justice Crothers asked the district judge members of the Committee whether there are any difficulties with the procedures for demand for change of judge statute.

Judge Schmitz said judges in the Southeast judicial district, in which he is chambered, often recuse in cases because of the relatively small area and generally known associations. He said he has rarely seen a motion for disqualification. Judge Severin agreed that motions for disqualification are unusual.

Judge Clapp said she also had not been involved in any motions to disqualify.

Justice Crothers observed that the general understanding and experience is that disqualification is less of a problem for the trial courts, particularly in light of the change of judge

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statute. Lawyers, he said, are generally aware of how the change of judge statute works. He said there is likely more of an issue for discussion with respect to disqualification at the Supreme Court level.

Sen. Armstrong said he had occasion to seek the disqualification of a judge, apart from the change of judge process and under the Code of Judicial Conduct, and the matter was handled very well.

Linda Bata said there are two competing considerations with respect to disqualification: the general concern regarding any appearance of impropriety, which is balanced against the general ethical requirement that a judge must hear assigned cases even if there may be some level of discomfort.

Justice Crothers noted that among the examples in the material the Tennessee procedure is very elaborate and has been subject to both criticism and approval depending on particular perspectives. He said such a procedure works well with people with good intentions, but it can be exploited and then inject chaos into a court proceeding.

Staff asked whether the Committee would like to further discuss the ABA model rule provision regarding disqualification based on campaign contributions.

Justice Crothers said the model rule provision may have little effect in light of the state's general history of uncontested judicial races. He said the Committee's earlier consideration of the provision suggested it may be unworkable because a single identified contribution amount to trigger disqualification may be appropriate in one area but not another and there was concern that contributions could be used as a preemptive tool for disqualifying a particular judge. An additional problem, he said, with a *per se* disqualification rule like the model provision is that the rule is couched in terms of whether the judge knows or "should have known" about an over-the-limit contribution. He said the concern is that the judge may then be placed in the position of *having to* investigate contributions, which is contrary to the ethical emphasis on using campaign committees to insulate the candidate from knowledge about contributions.

Chair Severin asked whether there was a general consensus that consideration of an additional process for disqualification at the trial court level is unnecessary and that the focus should be, instead, on a process for the court of last resort, i.e., the Supreme Court.

Following further discussion, Committee members agreed discussion should focus on review of procedures for disqualification at the Supreme Court level.

Justice Crothers noted that the only current direction with respect to disqualification of Supreme Court justices is set out in Comment [1] of Rule 2.11 of the Code of Judicial Conduct, which provides that "[i]n the Supreme Court, a motion for disqualification is referred to the justice

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against whom the motion is brought, The justice consults with other members of the court.” The question, he said, is whether there should be a more detailed, transparent process. He noted that nationally there is some sentiment that there is generally no authority to involuntarily remove a judge of a court of last resort from a case.

In response to a question from Sheila Peterson, Justice Crothers said justices of the Supreme Court fairly often recuse from particular cases for a variety of reasons.

Following further discussion, Committee members agreed that disqualification procedures from other jurisdictions with respect to courts of last resort should be assembled for review. Staff will assemble the background material for the next meeting.

There being no further business, the meeting was adjourned at 11:20 p.m.

Jim Ganje, Staff