

**In re Matter of the creation of SCR 74.02,
Appointment of the
Judicial Commission Members****SUPPORTING
MEMORANDUM
12-08**

This rule proposal comes before the Wisconsin Supreme Court upon the petition of Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court. Petitioner proposes that the Supreme Court adopt Supreme Court Rule 74.02 to provide that the Supreme Court's appointment of members to the Wisconsin Judicial Commission be discussed and made in open administrative conference. This petition and supporting memorandum are filed pursuant to the court's rulemaking and administrative authority conferred by Article VII, § 3 of the Wisconsin Constitution.

Pursuant to Article VII, § 11 of the Wisconsin Constitution, the legislature adopted Wisconsin Statute § 757.83 establishing a nine-member Judicial Commission responsible for investigating alleged acts of judicial misconduct and filing judicial disciplinary complaints. The legislature created the present Judicial Commission as an independent agency within the judicial branch of government. Pursuant to the statute, the Wisconsin Supreme Court appoints four members of the Judicial Commission: one trial judge of a court of record, one court of appeals judge, and two members of the State Bar of Wisconsin, who are not judges or court commissioners. Wis. Stat. § 757.83(1)(a).

The Wisconsin Supreme Court's appointment process begins with the Appointment Selection Committee which the Wisconsin Supreme Court created about 12 years ago. The Internal Operating Procedures address the Supreme Court's process of appointing lawyers and non-lawyer members to various boards, committees, and other entities, including the Wisconsin Judicial Commission. Specifically, Section IV of the Internal Operating Procedures sets forth the Supreme Court's appointment process. See Supreme Court's Internal Operating Procedures, available at <http://www.wicourts.gov/sc/IOPSC.pdf>. and attached hereto.

The Supreme Court has followed these procedures in the appointment of members to the Wisconsin Judicial Commission. The internal operating procedures provide, in part:

To avoid the appearance of favoritism or patronage in the appointment process, the court has created a committee independent of the court to assist in the process. The Appointment Selection Committee solicits and evaluates persons for appointment and nominates for the court's consideration the persons it determines are best qualified to serve. In evaluating the qualifications of persons interested in appointment, the Appointment Selection Committee applies the criteria established by the court for each of the entities to which appointment is made.

In order to ensure the integrity of the appointment process and avoid any perception that individual members of the court are interested or involved in the selection of specific individuals to be nominated by the Committee for appointment, the Appointment Selection Committee itself is not appointed by the court but by persons - lawyers and members of the public - designated not by name but by positions held in organizations related to the bar and state government. In this way, any perception that an individual member of the court is in a position to exert influence over any member of the Appointment Selection Committee or any of its decisions is obviated. No member of the court participates in the appointment process until after the Appointment Selection Committee has submitted nominations for specific appointment.

In making appointments, the court's objective is to provide quality and promote diversity on the boards, committees and other entities. The appointment procedure established by the court is designed to produce appointments based solely on the qualities of integrity, intelligence, experience and commitment.

The special circumstances surrounding appointments to the Judicial Commission require the Wisconsin Supreme Court to reassess its appointment procedures for members of the Wisconsin Judicial Commission to safeguard the integrity of the appointment process. The Judicial Commission investigations from 2007 to present culminated in one complaint filed with the Supreme Court in each of the following years: 2007, 2008, 2009, and 2012. Three of these four judicial disciplinary complaints were filed against justices of the Supreme Court. Furthermore, news stories indicate that the

Wisconsin Judicial Commission may have received requests to investigate possible misconduct by one or more justices.

It is appropriate at this time to consider amending and strengthening the appointment process in order to further ensure the integrity of the appointment process and to ensure that appointments to the Judicial Commission are based solely on the qualities of integrity, intelligence, experience and commitment. The Supreme Court must avoid the appearance of impropriety in the manner in which it conducts appointments to the Judicial Commission and must act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and of the Judicial Commission. See SCR 60.03. Public discussion and appointment of Judicial Commission members by the Supreme Court should help dispel any perception that justices of the Supreme Court may choose their own prosecutors or influence the Judicial Commission's work.

This petition proposes that the Supreme Court conduct the discussion and appointment of its appointed members to the Judicial Commission in an open administrative conference because the Supreme Court should utilize an open, well-publicized appointment process that promotes public confidence in the judiciary and helps to inform the public about what the Supreme Court is doing.

The Appointment Selection Committee will soon be once again submitting names to the Supreme Court for an appointment to the Judicial Commission. One of the Court's appointees to the Judicial Commission is eligible for reappointment and has been nominated by the Appointment Selection Committee for reappointment. Four members of the Court have declined to make the reappointment. See May 11, 2012 Letter to Attorney John Dawson attached, along with attachments. Discussing and voting upon potential candidates in open, public discussion will discourage the perception that appointees have been pre-selected to stack the deck in favor of certain outcomes.

I have no doubt that some will argue against a public vetting of candidates based upon concerns that potential appointees might shy away from service if their qualifications are discussed in public. But others will step up to serve. The loss of a few applicants is a small price to pay if we can safeguard the integrity of the Judicial Commission and the Supreme Court. The people of the State deserve no less.

The Supreme Court must maintain a system that ensures that Wisconsin judges conduct themselves in a manner that is fair, neutral, impartial and non-partisan. Impartial judges, like impartial referees on the playing field, are the only way to keep the system fair for the people of the State.

Respectfully submitted this _____ day of July, 2012.

Shirley S. Abrahamson
Chief Justice
Wisconsin Supreme Court

WISCONSIN SUPREME COURT
INTERNAL OPERATING PROCEDURES

* * * *

IV. APPOINTMENT PROCESS

The Wisconsin Supreme Court, pursuant to statutory authority and the court's rules, regularly appoints lawyers and nonlawyer members of the public to various boards, committees, and other entities. In making those appointments, it is the court's objective to maximize the participation of lawyers and the public in the work of those entities. To avoid the appearance of favoritism or patronage in the appointment process, the court has created a committee independent of the court to assist in the process. The Appointment Selection Committee solicits and evaluates persons for appointment and nominates for the court's consideration the persons it determines are best qualified to serve. In evaluating the qualifications of persons interested in appointment, the Appointment Selection Committee applies the criteria established by the court for each of the entities to which appointment is made.

In order to ensure the integrity of the appointment process and avoid any perception that individual members of the court are interested or involved in the selection of specific individuals to be nominated by the Committee for appointment, the Appointment Selection Committee itself is not appointed by the court but by persons—lawyers and members of the public—designated not by name but by positions held in organizations related to the bar and state government. In this way, any perception that an individual member of the court is in a position to exert influence over any member of the Appointment Selection Committee or any of its decisions is obviated. No member of the court participates in the appointment process

until after the Appointment Selection Committee has submitted nominations for specific appointment.

In making appointments, the court's objective is to provide quality and promote diversity on the boards, committees and other entities. The appointment procedure established by the court is designed to produce appointments based solely on the qualities of integrity, intelligence, experience and commitment.

A. Appointment Selection Committee

The Appointment Selection Committee (Committee) consists of the following 12 persons:

One attorney from the Milwaukee metropolitan area selected by the dean of the Marquette University Law School.

One attorney from outside the Milwaukee metropolitan area selected by the dean of the University of Wisconsin Law School.

The president of a county bar association located within the Eastern District of Wisconsin chosen by the court by lot, or his or her designee.

The president of a county bar association located within the Western District of Wisconsin chosen by the court by lot, or his or her designee.

The chair of the Family Law Section of the State Bar of Wisconsin, or his or her designee.

The chair of the General Practice Section of the State Bar of Wisconsin, or his or her designee.

The president of the Government Lawyers Division of the State Bar of Wisconsin, or his or her designee.

One former member of the Board of Attorneys Professional Responsibility or the Board of Bar Examiners who has not served within the preceding five years, chosen by the court by lot.

The chair of one of the district professional responsibility committees provided in SCR 21.08, chosen by the court by lot.

One nonlawyer member of the public designated by the Senate Co-Chair of the Legislative Council.

One nonlawyer member of the public designated by the Assembly Co-Chair of the Legislative Council.

One nonlawyer member of the public designated by the chair of the State Ethics Board.

To be eligible to serve on the Appointment Selection Committee, a lawyer must have practiced law for more than five years.

The term of a member is three years; the terms of the initial members are staggered by the court by lot to provide for the expiration of four members' terms each year.

Vacancies on the Appointment Selection Committee are filled by the persons identified above, respectively. Where the person is specified to be chosen by lot, a person is chosen by lot each time there is a vacancy in that position.

The Committee selects its chair at the first meeting of each calendar year. Staff support is provided to the Committee.

B. Meetings

The Committee meets at such times as considered necessary by its chair. The meetings are held at locations and times so as to enable the greatest number of members to participate.

C. Nomination Procedure

1. *Notice of Vacancy.* Each board, committee and other entity to which the Supreme Court makes appointment of lawyers and nonlawyer members of the public notifies the clerk of the court as soon as practicable of appointments that need to be made. The clerk of the court notifies the Committee chair of those appointments.

2. *Information to and Solicitation of Interested Persons.* In addition to the information disseminated by the court regarding the appointment of lawyers and nonlawyer members of the public, the Committee publicizes the appointments to be made by such means as, in the Committee's discretion, will provide notice to the greatest number of persons likely to be interested in being appointed. To the extent it deems necessary, the Committee may conduct in-person information and solicitation sessions to produce qualified persons interested in being appointed.

3. *Resumes; Interviews.* The Committee invites persons interested in being appointed to submit a written resume of their qualifications. The Committee may personally interview those persons whose resumes demonstrate qualifications that appear to warrant a personal, confidential interview before the full Committee or any number of its members the Committee may designate.

4. *Nomination.* Not less than 30 days prior to the expiration of a term or other applicable date that requires an appointment by the Supreme Court,

the Committee submits to the Supreme Court the names of at least two persons it nominates for appointment. If more than one position on a particular board, committee or other entity is to be filled by appointment at the same time, the Committee, in its discretion, may submit the number of names it considers appropriate for appointment to the positions generally or in respect to each position separately. Together with the nominations, the Committee submits to the court the resumes and other material it has considered regarding the persons nominated. The court may ask the Committee to submit additional nominations.

5. *Reappointment.* When a member of a board, committee or other entity is eligible for reappointment to a successive term, the Committee ascertains whether the member regularly attended meetings of the board, committee or other entity, made significant contribution to its work, and is willing to accept reappointment. If the member's participation has been satisfactory and the member is willing to accept reappointment, and the Committee nominates the member for reappointment to a successive term, it is unnecessary for the Committee to nominate other persons for appointment to the position. If the member's participation has been unsatisfactory or the member is not willing to accept reappointment, the Committee proceeds as in the case of an appointment.

6. *Criteria.* In determining the qualifications of persons for appointment, the Committee applies the criteria for the specific position established by the court from time to time and provided to the Committee in writing. The Committee may, with the approval of the court, apply additional specific criteria.

D. Reimbursement

Members of the Committee are reimbursed for travel, lodging and related expenses reasonably incurred in carrying out their duties.



Supreme Court of Wisconsin

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Clerk of Supreme Court

May 11, 2012

Attorney John R. Dawson, Chair
Wisconsin Judicial Commission
c/o Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202-5306

Dear Attorney Dawson:

We regret to inform you that the Supreme Court, over our objections, has voted not to reappoint you to a second full term on the Wisconsin Judicial Commission, which you currently chair. The court's long-standing practice has been to retain appointees for the entire period for which they are eligible if they have served the public well. In your case, the court is deviating from its practice.

In nominating you, the Appointment Selection Committee followed the procedure for reappointment set out in the Supreme Court Internal Operating Procedures. This requires that the committee weigh three factors in determining an eligible person's nomination for reappointment: 1. Whether the member regularly attended meetings of the board, committee or other entity; 2. Whether the person made a significant contribution to its work; and 3. Whether the person is willing to accept reappointment. The committee found that you met all of these criteria.

As you know, the role of the Appointment Selection Committee is a critical one. The court created this committee as part of the reorganization of the lawyer regulation system 12 years ago to ensure the integrity of the appointment process and avoid any perception that individual members of the court are interested or involved in the selection of specific individuals. The court's concern for the integrity of the appointment process was so strong that it set up the Appointment Selection Committee as completely independent of the court to ensure that no member of the court would be "in a position to exert influence over any member of the Appointment Selection Committee or any of its decisions...."

You are eminently qualified. Your legal experience, your long public service, your past service on the Judicial Commission, and your institutional knowledge are unmatched. We have reviewed your attached resume.

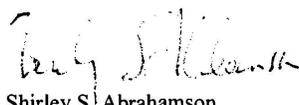
Racine County Circuit Court Judge Emily Mueller, writing on behalf of the nominating committee of the Judicial Commission, has urged the court to reappoint you because of your leadership skills so that you may again be nominated as chair of the Commission. The nominating committee is composed of a judge, a lawyer and two public members recently appointed by the Governor. See Judge Mueller's letter attached.

As you know, the Judicial Commission performs a very significant and difficult task investigating and prosecuting allegations of judicial misconduct and disability. The public and the judges must be assured that members of the Commission are selected solely on the basis of their integrity, intelligence, experience and commitment.

Appointments to the Judicial Commission are especially sensitive now. In 2007, 2009 and 2012, while you have been on the Commission, formal disciplinary complaints were filed against three justices of the Supreme Court. One complaint is awaiting appointment of a panel. Furthermore, news stories indicate that the Commission presently may have requests to investigate possible misconduct by one or more justices. Under these circumstances your reappointment by the court would have promoted public confidence in the integrity of the Judicial Commission and the integrity and impartiality of the Supreme Court. Unfortunately, it is not meant to be.

The Commission, the judiciary and the State will miss the benefit of your services. Our sincere and deep thanks for your work.

Sincerely yours,



Shirley S. Abrahamson
Chief Justice



Ann Walsh Bradley
Justice



N. Patrick Crooks
Justice

cc:

Judicial Commission:

- Atty. Michael J. Aprahamian
- Dr. Saied Assef
- Dr. Mark Barrett
- Eileen Burnett
- William E. Cullinan
- Lynn M. Leazer
- Hon. Emily S. Mueller
- Hon. Paul F. Reilly

Appointment Selection Committee:

- Atty. John P. Casey
- Atty. Susan A. Hansen
- Atty. Gayle Branaugh Jebbia
- Atty. Charles M. Kernats
- Atty. Theodore Bernard Kmiec, III
- Atty. Thomas M. Kubasta
- Atty. James Patrick O'Brien
- Hon. Amanda Rockman
- Mr. Charles Tubbs, Sr.

James Alexander
All Justices

Resume of John R. Dawson

John R. Dawson is a retired partner in Foley & Lardner LLP's Milwaukee office. He served as the managing partner of the Milwaukee office from 1994 to 1999 and previously served as the national chair of the firm's Litigation Department from 1986 to 1994. At the time of his retirement in 2005, Mr. Dawson was listed in The Best Lawyers in America® in the areas of alternate dispute resolution, business litigation and First Amendment law. His practice experience encompassed a broad range of commercial litigation and regulatory issues. Mr. Dawson served on the committee of State Bar members assessing for legislative introduction the Revised Uniform Arbitration Act. He is the author of two published articles on mediation: "Why Mediation Works When Negotiations Don't," *Wisconsin Law Journal* (Dec. 2003); and "Deciding When to Mediate Business Disputes," *Wisconsin Lawyer* (March 2005). From its formation in 2000 through September, 2006, Mr. Dawson served as a member of the Preliminary Review Committee of Wisconsin's Office of Lawyer Regulation upon appointment by the Wisconsin Supreme Court. Mr. Dawson chaired the Eastern District of Wisconsin Advisory Group on the Civil Justice Reform Act of 1990 under appointment by the chief judge of the district. Mr. Dawson is an adjunct professor at the Marquette University Law School, teaching a course on media law. He also served as president of the Milwaukee Bar Association in 1994-1995. He received his bachelor's degree in business administration from Northwestern University in 1963. Following active duty as a junior officer in the United States Naval Reserve in 1964-1967, Mr. Dawson received his J.D. degree in 1970 from Duke University School of Law. He was appointed to the Judicial Commission in November 2006.

Source: Wisconsin Judicial Commission



**CIRCUIT COURT BRANCH 3
EMILYS. MUELLER, JUDGE**

*Robin Anderson, Court Reporter
Cheryl Hegger, Clerk*

(262) 636-3436
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May 3, 2012

Chief Justice Shirley Abrahamson
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David Prosser Jr.
Justice Patience Drake Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman

Dear Justices:

I write as Chair of the Nominating Committee of the Wisconsin Judicial Commission. At our meeting earlier this week, the committee voted unanimously to nominate John Dawson, current Chair of the Judicial Commission, to serve as Chair for an additional one year term commencing August 1, 2012. Our recommendation will be made and voted on by all commissioners at the next full Commission meeting in June.

The Nominating Committee consists of four members of the Commission: two members appointed by the Supreme Court (Attorney Michael Aprahamian and myself) and two of the five new members recently appointed by Governor Walker (Dr. Saied Assef and Ms. Eileen Burnett). They have authorized me to advise you of our nomination since we understand that Mr. Dawson's current term on the Commission ends August 1, 2012 but that he is eligible to serve another three year term. He is one of the four commissioners appointed by the Supreme Court.

We understand that earlier this year Mr. Dawson was contacted by email by your program assistant, Sara Foster, inquiring whether he would be willing to serve another term on the Commission. He confirmed with us (as he had earlier with Ms. Foster) that he would be honored to do so. We are hopeful that his reappointment could be confirmed by the Court prior to the Commission's next meeting on June 22.

Racine County Uses 100% Recycled Paper

The Nominating Committee's unanimous recommendation was made after discussion of John Dawson's considerable experience and even-handed leadership. The Commission finds itself in unique circumstances: of the nine current commissioners, all but Mr. Dawson have served for fewer than 18 months, with five attending their first meeting just last week. We value Mr. Dawson's steady leadership and his commitment to the Judicial Commission, and believe that his continued service as Chair at this time would be an asset to the Commission.

Thank you for your consideration.

Sincerely,

Emily S. Mueller, Circuit Judge

Cc: Michael Aprahamian
Eileen Burnett
Saied Assef
James Alexander