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SENT BY EMAIL

Jeremiah Van Hecke
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Executive Director
Wisconsin Judicial Commission

RE: Judicial Commission Complaint by Judge Randy Koschnick

Dear Mr. Van Hecke:

I represent Judge Audrey Skwierawski. My client understands, through the public disclosure by Judge Randy Koschnick to media outlets, that Judge Koschnick has filed a complaint against Judge Skwierawski with the Wisconsin Judicial Commission.

Specifically, on August 15, 2023 it was reported by the Milwaukee Journal Sentinel that Judge Koschnick filed “five complaints with the Wisconsin Judicial Commission against Justices Ann Walsh Bradley, Rebecca Dallet, Jill Karofsky, and Janet Protasiewicz... as well as Milwaukee County Circuit Judge Audrey Skwierawski.” The article indicates that the reporter received a copy of the complaints. It states:

Koschnick in his complaints Tuesday argued Skwierawski cannot legally serve as Court’s Director until her term as Milwaukee County Circuit Court Judge ends in July, 2025 because the State Constitution bars sitting judges from holding non-judicial public offices until the end of their appointed term.

In addition to disclosing the complaints to the press, Judge Koschnick made a series of comments to the newspaper, including stating that he had an “obligation” to challenge what he “saw as an ongoing violation of the State Constitution.”

I am writing this preliminary letter to request that the Commission dismiss the complaints for multiple reasons.

First, Judge Koschnick blatantly violated Wis. Stat. § 757.93(1) and the Commission’s administrative rules by disclosing and discussing his complaints to the media. Wis. Stat. § 757.93(1) states:

All proceedings under ss. 757.81 to 757.99 relating to misconduct or permanent disability prior to the filing of a petition or formal complaint by the commission are confidential unless a judge or circuit or supplemental court commissioner waives the right to confidentiality in writing to the Commission. Any such waiver does not affect the confidentiality of the identity of a person providing information under par. (b).

The Commission's administrative rules confirm this strict confidentiality mandate, and provide that if a person filing a complaint violates the confidentiality rule, the complaint can be dismissed on that ground alone:

JC 3.01 Confidentiality. The proceedings of the judicial commission prior to the filing of a formal complaint concerning misconduct or a petition concerning permanent disability are confidential, unless a written waiver of confidentiality has been made by the judge or court commissioner. *If a person who makes an allegation under s. JC 4.01 or 5.01, breaches the confidentiality of the investigation, the commission may dismiss the allegation, admonish the person or take other appropriate action.* Clarifying and other statements may be made by the commission regarding investigation as provided in s. 757.93 (2), Stats. [Emphasis supplied]

The purpose of the statute and administrative rule establishing confidentiality is to protect a judge against baseless allegations of misconduct, and to prevent the Judicial Commission's complaint procedure from being used for political purposes.

It is evident Judge Koschnick is abusing the Commission's procedures and using the filing of the complaints in a political fashion. There is no other explanation for a former judge, cognizant of the statutory and administrative confidentiality that attaches to these proceedings, making statements to the press publicizing a confidential filing, publicly accusing the judges of wrongdoing, and apparently also providing actual copies of his complaints to the press.

Consistent with Wis. Admin. Code JC 3.01, the Commission should dismiss all five complaints for Judge Koschnick's intentional violation of the statute and administrative rule.¹

Second, dismissal is warranted because the complaint lacks any substantive merit. The constitutional provision in question, Wisconsin Constitution Article VII, Section 10(1), states:

No justice of the Supreme Court or judge of any court of record ***shall hold any other office of public trust, except a judicial office***, during

¹ In the alternative, if the Commission does not dismiss the complaint against Judge Skwierawski based upon Judge Koschnick's improper conduct, it should consider issuing a statement under Wis. Stat. § 757.93(2) that the Commission is reviewing the complaint, Judge Skwierawski denies the allegations, and no wrongdoing has been found.

the term for which elected. No person shall be eligible to the office of judge who shall not, at the time of election or appointment, be a qualified elector within the jurisdiction for which chosen.² [Emphasis supplied.]

Judge Skwierawski's agreement to serve, at the request of the Wisconsin Supreme Court, as an Interim Director of State Courts does not violate this provision, for two reasons: (1) the job of Director of State Courts is not an "office of public trust," and (2) even if it were, it is a "judicial office," expressly allowed under the constitution.

Both of these issues were analyzed and addressed in the April 8, 2008 Attorney General Opinion, OAG-4-08. Therein, the Attorney General was asked to determine whether an appointment to the former Government Accountability Board ("GAB") constituted an office of public trust, and if so, whether such an office was a judicial office and thus authorized by the constitution.

The Attorney General found the term "office of public trust" to be equivalent to "public office," and then defined the term based upon Wisconsin precedent:

A "public office" is one that is created by legislative act, possesses a delegation of a portion of the sovereign power of the state to be exercised independently without the control of a superior power, has some permanency, and is held by virtue of written authority. *Martin v. Smith*, 239 Wis. 314, 330-32, 1 N.W.2d 163 (1941).³

OAG-4-08, p. 4. The office of Director of State Courts does not include any delegation of the sovereign power of the state, does not exercise authority independently of a superior power, and has no permanency. The Director of State Courts is hired by and serves at the pleasure of the Wisconsin Supreme Court under the direction of the chief justice. SCR 70.01(1). The statutory powers of the Director of State Courts are purely administrative in nature, *see* Wis. Stat. § 758.19, and the administrative powers of the position are expressly subject to the Supreme Court's oversight. *See* SCR 70.03.⁴

² Wis. Stat. § 757.02(2) codifies this article: "The judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he or she was elected or appointed."

³ The Attorney General also relied upon *Wis. Law Enforcement Std. Bd. v. Lyndon Station*, 98 Wis. 2d 229, 295 N.W.2d 818 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), which similarly interpreted the term "office of trust" in Wis. Const. Art. III, Sec. 3 as requiring that the office independently wield a portion of the state's sovereign powers and have a level of permanency. The *Lyndon Station* court found the office of Village Police Chief was a public office because the position was created by legislative act, had the independent authority to arrest persons, and was permanent. *Id.* at 241-242.

⁴ The Supreme Court in *Martin* also noted that under the definition of "public office" it was adopting, the office must be one that is "entered upon by taking an oath." *Martin*, 239 Wis. at 332 (citation omitted). The Director of State Courts does not swear an oath upon assuming the position.

In addition, to the extent one could even argue that the position of Director of State Courts is a “public office,” it is a “judicial office” and thus expressly permitted by the constitution. The Attorney General’s opinion, after examining the structure and history of the Wisconsin Constitution, explained:

[T]he phrase “judicial office,” as used in the Judiciary article of the constitution, should be construed as referring to *an office that is located within the judicial branch of government created by that article*. The legislature has, in another context, provided a good definition of those agencies that are in the judicial branch. *See* Wis. Stat. §16.70(5): “‘Judicial branch agency’ means an agency created under ch. 757 or 758 or any agency created by order of the Supreme Court.” *Compare* Wis. Stat. §16.70(4) (“‘Executive branch agency’ means an agency in the executive branch but does not include the building commission.”). The [GAB], however, is not a judicial branch agency in this sense, for it is not created under Wis. Stat. ch. 757 or 758, nor is it an agency created by order of the Supreme Court. On the contrary, the Board has been created by the legislature under Wis. Stat. ch. 15, the title of which refers to the “executive branch.” The Board is thus an executive branch agency that is not under the supervisory authority or superintending control of the Wisconsin Supreme Court or the judiciary. Accordingly, membership on the board cannot be deemed a “judicial office” in the constitutional sense.

OAG-4-08, p. 7 (emphasis supplied).

In contrast to a position as a member of the GAB, the duties of the Director of State Courts are set forth in SCR Chapter 70 and Wis. Stat. Ch. 758, entitled, “Judicial Branch Agencies and Committees.” SCR 7.01 creates the Director of State Courts and defines its authority, all of which is subject to the control of the Wisconsin Supreme Court. Wis. Stat. § 758.19, entitled “Director of State Courts,” identifies the position, grants certain authority to the position, and provides legislative direction on the administrative role of the Director of State Courts. It is thus unassailable that even if the Director of State Courts could be viewed as an office of public trust, it is a “judicial office” as that term is used in Article VII, Section 10.

In sum, a judge is constitutionally authorized to assume other judicial offices, including the Director of State Courts.

Third, the complaint does not raise any viable issues under SCR 60, the Code of Judicial Conduct. While I have not seen a copy of the complaint, I surmise that it likely alleges a violation of either SCR 60.03(1) or SCR 60.05(3)(b). SCR 60.03(1) provides:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity

and impartiality of the judiciary.

To the extent the complaint alleges Judge Skwierawski is not complying with the law by serving in the role of Director of State Courts, the above analysis—which Judge Skwierawski undertook before accepting the position—demonstrates why doing so violates no law and thus does not violate the Judicial Code.

SCR 60.05(3)(a) states:

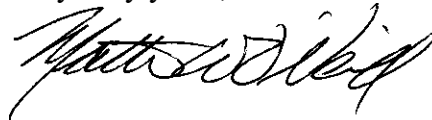
A judge may not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy *on matters other than the improvement of the law, the legal system or the administration of justice*. A judge may represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities and may serve on a governmental or private committee, commission or board concerned with historical, educational or cultural activities. A judge may serve in any branch of military reserves and be called to duty in the active military. [Emphasis supplied.]

The Director of State Courts is a position purely focused on the improvement of the law, the legal system, and the administration of justice. SCR 60.05(3)(a) confirms that judges can serve in governmental positions such as the Director of State Courts.

Accordingly, Judge Skwierawski's acceptance of the appointment to serve as the Interim Director of State Courts does not violate the Judicial Code.

For the foregoing reasons, we respectfully request that the Judicial Commission dismiss Judge Koschnick's complaint against Judge Skwierawski.

Very truly yours,



MATTHEW W. O'NEILL

MWO: mbb