

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
March 17, 2017

The Judicial Council met at 9:30 a.m. in Room 328NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Sarah Walkenhorst Barber, Sherry D. Coley, Honorable Michael R. Fitzpatrick, Honorable Eugene A. Gasiorkiewicz, William C. Gleisner, R. Duane Harlow, Devon M. Lee, J. Denis Moran, Dennis Myers, Benjamin J. Pliskie, Thomas L. Shriner, Chuck Stertz, Senator Van H. Wanggaard.

MEMBERS EXCUSED: Christian A. Gossett, Representative Jim Ott, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Erika Strebel, Wisconsin Law Journal; Marisa Janssen, Winnebago County District Attorney's office.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. Members introduced themselves and welcomed new member, Judge Gene Gasiorkiewicz, Racine County Circuit Court. Attorney Southwick circulated the roll call sheet.

II. Approval of February 17, 2017 Minutes

MOTION: Council member Myers moved, seconded by Council member Stertz, to approve the February 17, 2017 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Supreme Court Petition 16-02, Proposed Amendments to the Rules of Evidence

Prior to the meeting, Attorney Southwick circulated a draft of the amended petition and supplemental memorandum in support. Council member Shriner provided a brief history of the project. He explained that the Evidence & Civil Procedure Committee sought the advice of Professor Daniel Blinka, Marquette University Law School, when it drafted the revised recommendations contained in the amended petition. Prof. Blinka also provided an excellent memo explaining the distinction between "credibility" and "character for truthfulness."

Attorney Southwick explained that in addition to the revised amendments to the rules contained in the petition, she amended the Judicial Council Committee Notes to ss. 906.08 and 906.09 to include excerpts from the federal Advisory Committee Notes. At the supreme court's administrative conference discussion of the proposed amendments, some justices suggested that

the Council include the notes from the federal advisory committee. Members approved the changes to the Judicial Council Committee Notes by consensus.

MOTION: Motion to approve the amended petition and supplemental memorandum for filing was approved unanimously with Council member Wanggaard abstaining.

IV. Discussion and/or Action Regarding Judicial Council's 2017-2019 Budget

Prior to the meeting, Attorney Southwick circulated a draft copy of a memo to the Joint Finance Committee opposing the elimination of the Judicial Council in the Governor's proposed budget. Attorney Southwick reported that the supreme court has also taken a position opposing the elimination of the Judicial Council. While the court's position was viewed as positive news, the Council was generally disappointed that the court did not advocate for funding for the Council. Council member Shriner expressed his frustration that Council members have to waste so much of their time on this issue every other year. Members volunteer their service on the Council to work on important legal issues, not budget battles.

Members discussed that the Judicial Council's name could be causing other branches to conclude incorrectly that the Council is part of the court. Council member Shriner noted that the Council's independence from the court allows it to utilize members from all three branches of government. It also encourages participation from individuals who would not or could not volunteer without the Council's nonpartisan, independent status. Council member Pliskie inquired whether the Council has ever appointed a committee to try to address the confusion that stems from the Council's name and the general lack of knowledge regarding the Council's purpose and duties. He suggested that the Council should be more proactive instead of reacting during the budget. Attorney Southwick stated that the Council has not appointed a committee to address this issue. Council member Pliskie proposed that the Council appoint a committee tasked with "marketing." Council member Shriner suggested that the Council could undertake more projects that involve drafting bills so that legislators become more familiar with the Council's work. He also suggested that the Council could highlight its history of drafting legislation.

Council member Wanggaard felt that the Council's name causes confusion regarding the work that the Council does and who benefits from the work. Some legislators do not understand that the Judicial Council benefits them, as well as the courts. He stated that he has been working to educate his colleagues in the Legislature regarding the importance of the Council's work. He stressed the importance of Council members calling their legislators, members of the Joint Finance Committee, and the Governor's office to speak in support of the Council and explain why its work is important.

Council member Moran reported that the Chief Justice is meeting with all the member of the Joint Finance Committee. As part of her budget discussions, she is requesting that the Legislature retain the Judicial Council. He indicated that the Chief Justice has received a positive response from legislators.

Members discussed the importance of retaining the Council as a statutorily created entity under Wis. Stat. § 758.13. Members also discussed the benefits of having the Council administratively attached to the Director of State Court's office. Council member Shriner noted that an administrative affiliation with the court might aid the Council in achieving pay equality for its staff member in relation to other agency heads in comparable positions. Attorney Southwick explained that although she is the agency head and her job description states that she is to perform the executive director duties, she is classified as a staff attorney instead of an executive like other similarly situated agency heads. Council member Moran stated that the executive directors of the Judicial Council and the Judicial Commission were historically classified at the same level with comparable pay, but that is no longer the case. The Director of State Court's office has calculated the amount of compensation that the Council's staff person should receive based on comparisons to other similar positions. Council member Moran added that if the Council's attorney resigns, it will be very difficult to recruit a competent, qualified replacement at her current salary level with no administrative support for her position. Council member Gleisner commended Attorney Southwick on the high quality of her work.

Members continued to question why the executive branch has recommends elimination of the Council. In the current budget, the recommendation results in no cost savings. Several members have inquired with the Governor's office, but have received no answer. Council member Harlow stated that the Department of Justice has not taken a position on the issue yet, but he has briefed the Attorney General, who has historically supported the Council and its work.

Members discussed the draft memo that Attorney Southwick prepared for Chair Bertz to submit to members of the Joint Finance Committee. Council member Shriner suggested that in addition to the memo, Attorney Southwick should prepare a single page executive summary. He suggested that she consult with Chair Bertz and Council members Moran and Myers regarding the contents of the executive summary. Members agreed by consensus that Attorney Southwick should draft an executive summary with the assistance of the named members and circulate it to the Joint Finance Committee members along with the memo from Chair Bertz.

Attorney Southwick reported that the Joint Finance Committee has release the schedule for agency budget briefings. The Judicial Council has been consolidated with the supreme court and set to appear on Tuesday, March 28, 2017. The briefings begin at 9 a.m., but there are a number of agencies set to appear, so the court will probably not be heard until later in the day. Attorney Southwick's understanding was that the Chief Justice would be speaking on behalf of the court, including the Judicial Council. Attorney Southwick will be present at the briefing in case any questions arise.

Council member Myers reported that public hearings before the Joint Finance Committee have been scheduled. Council member Wanggaard suggested that phone calls to legislators might be more effective than appearing at the public hearings to oppose the elimination of the Council.

V. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the Appellate Procedure Committee continues to work on a rule regarding substitution and withdrawal of counsel at the appellate level. The committee currently has no other pending projects, although the Appellate Practice Section of the State Bar has indicated that they may have some suggested projects for the Council to consider.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee continues to study the discovery process in criminal cases. The committee has agreed to draft a model checklist for use by law enforcement to ensure that all information is transmitted to the prosecutor. The committee also intends to work on a model checklist for use by prosecutors to ensure that all discoverable information is provided to the defendant. The committee's goals include encouraging consistency in discovery practices throughout the state, and increasing awareness and providing education on issues (for example, production of recordings) that have been identified through surveys the committee has conducted.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee is studying the amendment to federal Rule 37 regarding discovery sanctions for failure to preserve evidence and considering whether Wisconsin's rule (s. 804.12) should be amended to reflect the federal changes. The committee is discussing whether a spoliation rule should be limited to electronically stored information (ESI) or whether there should be a rule that encompasses the destruction of all evidence. Attorney Southwick noted that discovery involving ESI tends to occur more frequently in business litigation. With the recent approval of a pilot project to create state courts specializing in business litigation, updating Wisconsin's discovery rules takes on even greater importance.

The committee will also discuss a proposed amendment to Wis. Stat. § 806.02, default judgment, that was suggested by a Wisconsin attorney. The committee will discuss whether it should be recommended as a Judicial Council project for further study.

VI. Other Business

A. PPAC Liaison's Report

There was no PAC report.

B. Council Attorney's Report

Attorney Southwick reported that the Council's class action rule change petition has been filed with the supreme court. It has been assigned petition number 17-03.

VII. Adjournment

The Council adjourned by consensus at approximately 10:55 a.m.