

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
April 16, 2010

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

**MEMBERS PRESENT:** Chair Beth E. Hanan, Vice-Chair Marla J. Stephens, Thomas W. Bertz, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Robin L. Ryan, Professor David E. Schultz, Senator Lena Taylor, A. John Voelker.

**MEMBERS EXCUSED:** James C. Boll, Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Rebecca St. John, Honorable Mary K. Wagner, Honorable Maxine A. White.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Kate Battiato, Office of Representative Hebl; and Eric Peterson and Christopher Gibbs, Office of Senator Lena Taylor.

**I. Call to Order and Roll Call**

Chair Hanan called the meeting to order at 9:45 a.m.

**II. Approval of March 19, 2010 Minutes**

MOTION: Council member Schultz moved, seconded by Council member La Fleur, to approve the minutes. Motion approved unanimously.

**III. Appointment of a Nominating Committee**

Chair Hanan asked for volunteers to serve on a committee tasked with nominating candidates to serve as chair and vice-chair for the 2010-2011 council year. Vice-Chair Stephens, and Council members Grenig and Taylor volunteered. Chair Hanan appointed Vice-Chair Stephens to chair the nominating committee, and she asked the committee to be prepared to make their recommendations for an election at the June 2010 council meeting. Vice-Chair Stephens requested that anyone interested in serving as chair or vice-chair contact her. Attorney Southwick stated that she would also send an email asking all interested members to please contact Vice-Chair Stephens.

**IV. Discussion and/or Action Regarding Request to Consider Notice of Appellate Panel or Judge Assignment**

Attorney Brad Foley submitted a request to the Judicial Council to alter the procedure in the court of appeals to provide the parties advance notice identifying the single judge or panel assigned to their case. Attorney Southwick also forwarded Mr. Foley's suggestion to the court of appeals. Chief Judge Brown responded with a letter indicating that Mr. Foley's request would

involve a change to the appellate court's internal operating procedures, so he believes the request is best addressed by the court. Judge Brown agreed to place it on the agenda for their next meeting.

Vice-Chair Stephens stated that currently the court of appeals informs the parties of the judge(s) assigned to their case if the parties call the court and request the information. Council members discussed whether any additional action needs to be taken by the Council at this time. They agreed by consensus to defer to the court of appeals' offer to address Attorney Foley's request. Council member Taylor volunteered to follow up on this matter with Attorney Foley and the court of appeals.

## **V. Discussion and/or Action Regarding Supreme Court Rule Petition Nos. 10-01 and 10-02, Content of Appendices**

The Judicial Council received a letter from the supreme court inviting written or oral comments on rule change petition nos. 10-01 and 10-02. These petitions seek rule changes to require inclusion of any cited unpublished opinions in the appendices accompanying appellate briefs and petitions for review.

Chair Hanan stated that the Council's original rule change petition (No. 08-02) to allow citation to unpublished opinions did not propose requiring the inclusion of copies because unpublished opinions are widely accessible. Additionally, the previous rule allowing citation in very limited circumstances did not include a requirement to submit copies. The Council's memorandum supporting petition no. 08-02 also noted that requiring copies to be included would add unnecessarily to the expense.

The Council discussed the current requirements regarding the appendix and noted that circuit court opinions (other than the one being appealed), and other forms of persuasive authority are not required to be included in the appendix.

**MOTION:** Vice-Chair Stephens moved, seconded by Council member Ptacek, to take no position on rule petition nos. 10-01 and 10-02. Motion approved unanimously.

## **VI. Committee Reports**

### **A. Appellate Procedure**

Committee chair Stephens reported that the Appellate Procedure Committee has completed its recommendation concerning amendments to the statutes regarding presentence investigations. Attorney Southwick prepared a draft memo to the Council regarding the project. At today's meeting, committee members will review and discuss the draft memo, and their upcoming presentation to the Council.

The committee has not begun to work on the project regarding ghostwriting of legal documents.

Council member Taylor asked for additional information regarding the presentence investigation project. Committee chair Stephens explained that the recommendation would require presentence investigation material to be included in the record on appeal, unless there is a motion to exclude. The proposed revision maintains confidentiality of the materials on appeal, and provides guidance to appellants on the use of the presentence investigation material in briefs and arguments. It requires that the presentence report be neutral, and allows defense counsel notice and an opportunity to attend the defendant's presentence investigation interview. The proposal provides a 21-day process to allow a defendant to review and object to the accuracy of the report, and to allow the report writer an opportunity to make corrections. It requires the court to rule on any unresolved objections prior to sentencing. The draft adds some additional required content including identification of resources in the community to meet the defendant's needs, and information regarding restitution and sentence credit. It requires that the victim's statement and information be severable to better maintain confidentiality. It also adds provisions regarding protective orders, and addresses access by unrepresented defendants. Finally, the proposal allows the Department of Corrections to correct substantiated errors of material fact in the report, at the subject's request.

Committee chair Stephens anticipates that the draft proposal will be presented to the full Council in either May or September. The full Judicial Council will be asked to review it and decide whether the full draft will be recommended as a bill, or whether the Council may support only certain portions of the draft.

## **B. Criminal Procedure**

Committee chair Schultz reported that the workgroup (Schultz, St. John and Stephens) met on April 9. They completed their review of the remaining provisions that the workgroup members still needed to resolve, including videoconferencing. Attorney Southwick has conveyed the workgroup's responses and requests to the Legislative Reference Bureau (LRB) drafters. The LRB has already completed the additional revisions to many of the chapters.

The committee also has a new project regarding substitution of judges in termination of parental rights cases, although they have not begun to discuss it yet.

## **C. Evidence and Civil Procedure**

Committee chair Leineweber reported that the committee met on March 19 to continue its review of the rules of evidence. Committee members continued to discuss the "other acts" rule, Wis. Stat. § 904.04. Marquette Professor Daniel Blinka will participate in the committee's May meeting to share his thoughts on possible amendments to the "other acts" rule. At today's meeting, the committee will also continue to discuss a provision to allow authentication of business records, similar to the provision for medical records, and may begin discussing character for truthfulness, Wis. Stat. § 906.08.

The supreme court will discuss the Council's amended petition regarding discovery of electronically stored information (no. 09-01) at an open administrative conference on April 28.

The State Bar has also invited committee members to participate in a continuing legal education webcast on e-discovery.

## **VII. Other Business**

### **A. PPAC Liaison's Report**

Council member Voelker reported that a petition is currently being drafted to address security in court facilities. PPAC is also creating a committee to review whether there is a role for the court to play in addressing discreet task representation for pro se litigants.

### **B. Assembly Judiciary Committee Report**

Council member Hebl reported that the small claims bill (AB 524) passed the Assembly.

### **C. Senate Judiciary Committee Report**

Council member Taylor reported that the bill to allow police officers to electronically file criminal complaints with the District Attorney's office has been signed into law. The committee is also considering closing a juvenile facility and possibly reopening it as an OWI facility. AB 810, the bill creating an evidentiary privilege in veterans court for communications between veterans and veteran mentors, has passed both houses. The municipal court bill (SB383) passed the Assembly. SB 674 was introduced. It raises (from 17 to 18) the age at which a person who is alleged to have violated a civil law or municipal ordinance is subject to the jurisdiction and procedures of the circuit court or, if applicable, the municipal court. The change will allow Wisconsin to maintain compliance to qualify for certain federal funding.

Council member Taylor requested Judicial Council support for a Joint Legislative Council study committee on criminal and civil justice funding and strategies. She explained that the Council of State Governments has resources and information regarding programs and processes used by other states that a study committee could access and use to improve the justice system in Wisconsin. Approximately 15 other organizations have already supported Council member Taylor's recommendation to form the study committee. Council member Leineweber inquired as to the scope of the study. Council member Taylor responded that the scope would be largely determined by the information received from the Council of State Governments. She added that her request to form the study committee was in part driven by the difficulty she experienced during the last budget session in obtaining information regarding how funds are currently being distributed and used by the various justice agencies. She believes a study committee could obtain information from the Council of State Governments regarding more efficient funding strategies. Council member Taylor asked Attorney Southwick to contact Eric Peterson in her office to obtain additional information to distribute to council members regarding both the proposed study committee and the Council of State Governments. She also asked individual council members to contact co-chairs Sen. Risser and Rep. Schneider to express their support for the formation of the study committee. Eric Peterson added that contact should be made with the co-chairs prior to May 1.

**MOTION:** Vice-Chair Stephens moved, seconded by Council member Ptacek, to send a letter to Sen. Fred Risser and Rep. Marlin Schneider expressing the Judicial Council's support to create a Joint Legislative Council Study Committee on Criminal and Civil Justice Funding and Strategies. Motion approved unanimously.

**D. Council Attorney's Report**

Attorney Southwick reported that the amended petition regarding the discovery of electronically stored information (no. 09-01) will be discussed at a supreme court open administrative conference on April 28 at 1:30 p.m. The Council's rule change petition regarding communications in mediation (no. 09-12) is scheduled for a public hearing before the supreme court on April 27 at 2:00 p.m. The State Bar has invited Attorney Southwick, Council members Leineweber and Grenig, and Committee members Gleisner and Sankovitz to participate in a continuing legal education webcast regarding the proposed discovery rules addressing electronically stored information. The webcast is currently scheduled for June 9, 2010.

**VIII. Adjournment**

Chair Hanan announced that the Evidence & Civil Procedure Committee and the Appellate Procedure Committee will meet at 11:00 a.m. The next Judicial Council meeting is May 21, 2010.

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