

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
May 19, 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, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, J. Denis Moran, Dennis Myers, Representative Jim Ott, Thomas L. Shriner, Chuck Stertz, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright.

MEMBERS EXCUSED: Sherry D. Coley, Honorable Eugene A. Gasiorkiewicz, R. Duane Harlow, Devon M. Lee, Benjamin J. Pliskie, Honorable Robert P. Van De Hey, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Anthony LoCoco, Law Clerk to Justice Annette K. Ziegler; Cale Battles and Lynne Davis, Wisconsin State Bar.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. Attorney Southwick circulated the roll call sheet.

II. Approval of April 21, 2017 Minutes

MOTION: Council member Stertz moved, seconded by Council member Myers, to approve the April 21, 2017 meeting minutes as presented. Motion approved unanimously.

III. Appointment of a Nominating Committee

Each year, a nominating committee is tasked with nominating candidates to serve as chair and vice chair for the upcoming Council year. The nominating committee will announce its recommendation at the June Council meeting. The committee generally consists of three members. Chair Bertz asked for volunteers to serve on the committee.

ACTION: Council members Gleisner, Wagner, and Myers volunteered to serve on the committee.

IV. Discussion and/or Action Regarding Potential New Projects:

A. Uniform Collaborative Law Act

Prior to the previous meeting, Attorney Southwick circulated a memorandum dated April 14, 2017, along with a copy of the Uniform Collaborative Law Act (UCLA) and an “FAQ” from the Uniform Law Commission. At the previous meeting, the Council discussed the potential project. Some members expressed concern that the Judicial Council is not the appropriate body

to make a recommendation because no current members practice in the area of family law. Council member Pliskie moved, seconded by Council member Stertz, to deny the project. After further discussion, members agreed by consensus to table the motion. The Council asked Attorney Southwick to contact Attorney Catherine La Fleur, a former Judicial Council member who uses the collaborative law process in her family law practice, to inquire whether she feels the Judicial Council is an appropriate body to study this issue.

The Council continued its discussion. Attorney Southwick reported that the State Bar Family Law Section Board is currently studying the UCLA, as well as rules proposed by the Collaborative Family Law Council of Wisconsin. Attorney La Fleur agrees that Wisconsin should have rules to regulate the collaborative law process and she felt that the Council would be an appropriate body to make a recommendation. She offered to provide a presentation to the Council to educate members on collaborative law.

Attorney Southwick reported that the National Center for State Courts (NCSC) considered the UCLA and took no formal position. The American Bar Association (ABA) took a position in opposition because the Tort Trial, Insurance Practice, and Litigation Sections were all opposed to it. At least eight states have enacted the UCLA and it has been introduced in at least two more states for the 2017 legislative session, including Illinois. Some states have enacted it only for use in family law matters.

Council member Shriner reiterated his opposition to undertaking the project because there are no members with expertise in this area. He also expressed concern because it is not a rule of pleading or practice so it may be outside the scope of the Council's powers and duties. Attorney Southwick agreed, but noted that s. 758.13(2)(d) gives the Council a broad directive to, "Receive, consider and in its discretion investigate suggestions from any source pertaining to the administration of justice and to make recommendations."

Council member Gleisner spoke in support of accepting the project. He suggested that rules regarding collaborative law could replace certain rules of civil procedure, so it should be considered by the Council. He also advocated having Attorney La Fleur give a presentation so that members can learn more about the collaborative process and why the Council should study it.

MOTION: Members acted on the motion that was previously tabled, and denied the project by a vote of six members in support of denying the project and four members opposed. Council members Ott and Wanggaard abstained and two members were not present for the vote. Members agreed that the Council may reconsider its position if the State Bar Family Law Section requests input from the Council.

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

Attorney Southwick reported that the Joint Finance Committee voted unanimously (16-0) to remove the Governor's recommended elimination of the Judicial Council from the 2017-2019 budget bill. While this is very good news because the Council will continue to exist, it does not address the problems associated with the Council's lack of funding. The Council remains

dependent on funding from the Director of State Court's office. Council member Moran indicated that the Council has his support as long as he remains director, but he will be leaving that office in a few months. He felt the Council's funding would be secure in the 2017-2019 biennium, provided the director's office does not experience unexpected financial issues. However, he felt that without any dedicated funding, the Council remains at risk. Council member Wanggaard stated that he and Council member Ott are still working on securing funding for the Council.

14:00

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

VII. Discussion and/or Action Regarding Supreme Court Rule Petition 17-03, Class Actions

VIII. 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 is also assisting Attorney Southwick with drafting a memorandum in support of the petition regarding size and number of appellate briefs in multiparty cases. The petition was previously approved by the Council.

Council member Van De Hey also noted that the committee is working to build support for introducing the Judicial Council's draft bill to reorganize the rules regarding prisoner challenges to agency decisions. Council member Van De Hey explained that the current process is very confusing. He added that it is so confusing that many inmates have stopped trying to use it. Instead, inmates often file John Doe petitions to bypass the prisoner litigation process. While he agreed that prisoners often abuse the system, he also pointed out that prisoners are some of the most vulnerable in the justice system and they need access to the courts. The draft bill reorganizes prisoner litigation rules that are scattered throughout the statutes and places them in one subchapter where they would be much easier to find, understand, and follow.

Council member Myers inquired as to which groups might support the bill. Attorney Southwick responded that she has been talking with judges and court staff attorneys in some of the counties where a high number of these cases are filed, including Dane and Grant Counties. She has also sought support from the University of Wisconsin Law School's Remington Center. Milwaukee County handles a large number of these cases, so she will be contacting corporate counsel to discuss possible support. Council member Gossett suggested that Dodge County might also be interested in this issue. Vice Chair Blanchard inquired as to the Department of Justice's position. Council member Harlow indicated that DOJ has decided not to support the

bill because DOJ feels the process is already established by law and codifying it is not in the best interests of DOJ.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee continues to study the discovery process in criminal cases. The committee continues to draft a model checklist for use by law enforcement to ensure that all information is transmitted to the prosecutor. The committee is focusing on keeping the checklist simple and easy to use by limiting it to a list of the categories of information that must be produced.

Attorney Southwick explained that the study the committee has undertaken has really altered the direction of its work. Initially, members probably expected that the surveys would produce many complaints by defense attorneys who feel that prosecutors are not producing sufficient information in a timely manner. While the committee received some of those complaints, a considerable number of complaints came from prosecutors indicating that law enforcement is not providing them with all the information in a timely manner.

The committee may have initially expected that the project would involve drafting statutory amendments to address production by prosecutors. Instead, it appears that the problem has a much deeper root, so the committee determined that it would be best to begin addressing the issue by creating a checklist and drafting some “best practice” recommendations for law enforcement. It is also working with DOJ to identify areas where additional training might be helpful. It appears that if there is more complete production by law enforcement, the information will be more likely to be produced to the defendant in a timely manner.

C. Evidence and Civil Procedure

Attorney Southwick reported that petition 17-03, class actions, was discussed by the supreme court at its administrative conference the previous day. The court voted to seek comments on the petition and set it for a public hearing. Some justices appeared to want more information, so the court commissioner will talk with the justices and draft a letter to the Judicial Council to relay their questions.

With regard to 16-02, rules of evidence, Attorney Southwick has filed the amended petition and supplemental memorandum. Attorney Southwick does not know whether the court will resume its discussion of the petition at an administrative conference or whether the court will schedule another public hearing on the petition.

Committee chair Shriner reported that the committee continues to study the 2015 amendment to Rule 37 of the Federal Rules of Civil Procedure regarding failure to preserve electronically stored evidence. Wisconsin’s current rule is based on the previous version of the federal rule. The previous version resulted in many problems at the federal level due to inconsistent application of the rule and the imposition of huge sanctions. The threat of huge sanctions has resulted in over-preservation of information, which increases the cost of litigation. While problems such as those occurring at the federal level have not been reported in Wisconsin,

the committee is considering whether Wisconsin's rule (s. 804.12) should be amended to reflect the federal changes.

IX. Other Business

A. PPAC Liaison's Report

There was no PAC report.

B. Council Attorney's Report

Attorney Southwick reported that she is working with Council member Ott regarding introduction of the Council's bill to repeal a generally unused and confusing statute regarding privileges for deans of students and school psychologists (Wis. Stat. § 885.205).

At a previous meeting, Council member Pliskie suggested that the Council form a committee to increase awareness and knowledge about the Council among members of groups such as the Legislature. If the Council would like to have a broader discussion of that suggestion, she offered to put it on a future agenda for further consideration. The Council's legislative members felt that Council members need to be talking with their legislators right now to convey that information while the budget is being discussed. Council member Ott suggested asking former Council members to contact the Joint Finance Committee in support of the Judicial Council.

Council member Wanggaard discussed ways to convey to the Legislature that the Judicial Council saves the state money. Council member Moran noted that many Judicial Council projects would each cost the state three times the Council's annual budget if those projects were done by other groups. He also noted that many Judicial Council projects simply would not be done without the Council, so there would be a significant lost opportunity cost. The procedural rules would become increasingly outdated, reducing court efficiency and driving up the cost of litigation.

X. Adjournment

The Council adjourned by consensus at approximately 10:25 a.m.