

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 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 resumed 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 Section, Insurance Practice Section, and Litigation Section 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 enacting states have limited its use to only family law matters.

Council member Shriner reiterated his opposition to undertaking the project because there are no Council 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 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 the Council should consider it. He also supported 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 might 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 expressed his belief that the Council's funding will 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 source, the Council remains at risk. Council member Wanggaard stated that he and Council member Ott are still working on securing funding for the Council. The Council extended its thanks to Council members Wanggaard and Ott for their efforts during this difficult budget process.

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

Attorney Southwick reported that the court discussed petition 16-02A at an administrative conference. The court agreed to circulate it for public comment and set it for another public hearing in the fall. The court commissioner's recommendation indicated that another public hearing was not necessary. The court disagreed because the amended petition proposes an amendment to Rule 906.08(3) and that subsection was not identified in the original notice and public hearing. Several justices were complimentary of the amended petition and supplemental memo.

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

Petition 17-03 was discussed by the supreme court at its administrative conference on April 20, 2017. The court voted to seek comments on the petition and set it for a public hearing. At least one justice requested more information, so the court commissioner offered to talk with the justices and draft a letter to the Judicial Council to relay their questions. Attorney Southwick reported that she has not received the letter and no hearing date has been scheduled.

VIII. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that she is working with the committee to draft the memorandum in support of the petition regarding the record on appeal. (The petition was previously approved by the Council.) The committee will be reviewing a draft at the meeting later in the day. The committee also continues to work on a rule regarding substitution and withdrawal of counsel at the appellate level. The committee is nearing completion on a recommendation. Attorney Southwick predicted that a proposed rule will be ready for the Council to review in the fall.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee continues to study the discovery process in criminal cases. The committee has completed a draft of a model checklist for use by law enforcement to ensure that all information is transmitted to the prosecutor. The checklist has been circulated to a number of district attorneys with a request that

they seek feedback from members of law enforcement. Council member Gossett added that the draft was also discussed at a recent prosecutor's conference.

Attorney Southwick reported that the Department of Justice's representative on the committee is retiring this summer, but she was confident that DOJ would appoint a well-qualified replacement.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to study the 2015 amendment to Rule 37(e) 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. While problems such as those occurring at the federal level have not been reported in Wisconsin, the committee is likely to recommend that Wisconsin's rule (s. 804.12(4m)) should be amended to reflect the federal changes.

At the committee meeting following the Council's meeting, the committee is going to have a preliminary discussion regarding the two newest projects approved by the Council and referred to the committee at last month's meeting (the Uniform Unsworn Domestic Declarations Act and default judgments). Committee chair Shriner provided some background on the projects and a summary of the issues that the committee will begin addressing.

IX. Other Business

A. PPAC Liaison's Report

There was no PAC report.

B. Council Attorney's Report

Attorney Southwick reported that she filed the Council's petition regarding length and number of briefs in multiparty appellate cases. It was assigned petition number 17-05.

Attorney Southwick also reminded members that the June meeting includes the volunteer recognition event that will be attended by many former members of the Council and other special guests. There will be light refreshments prior to the event. Attorney Southwick suggested that members allow an additional hour for meeting attendance that day. She is working on the guest list and will send invitations out the following week.

X. Adjournment

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