

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
September 21, 2012

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

**MEMBERS PRESENT:** Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, William Gleisner, Tracy K. Kuczenski, Representative Jim Ott, Honorable Gerald P. Ptacek, Senator Fred Risser, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, Greg M. Weber, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Christine Rew Barden, Allan M. Foeckler, Catherine A. La Fleur, Honorable Mark Mangerson, A. John Voelker, Honorable Mary K. Wagner.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar.

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

Chair Bertz called the meeting to order at 9:35 a.m.

**II. Approval of June 15, 2012 Minutes**

**MOTION:** Council member Stephens moved, seconded by Council member Shriner, to approve the June 15, 2012 meeting minutes as submitted. Motion approved unanimously.

**III. Discussion/Action Regarding Potential Projects**

**A. Wis. Stat. § 809.62, Conditions of Grant of Review**

Attorney Southwick reported that a recent Wisconsin Supreme Court opinion (*In re Ambac Assur. Corp.*, 2012 WI 22) referred to an anomaly concerning provisions in s. 809.62 that (1) permit the respondent to a petition for review to raise issues not raised in the petition, but (2) limit the "parties" on review to arguing issues raised in the petition. The Court considered and resolved the case on the basis of an issue raised by the respondent, which the Court and the Chief Justice agreed was the correct way to handle it. The Chief Justice, in her concurrence, suggested that the Judicial Council or the Appellate Section of the State Bar might want to look at the rule and propose an amendment.

Council member Shriner spoke in support of accepting the project because the statute has internal inconsistencies that appear unintended. Council member Roggensack added that the court has an internal operating procedure that requires the vote of at least three justices to accept a case for supreme court review; however, the internal operating procedures require the vote of four justices to take up an issue that was not raised in the petition for review.

Attorney Southwick explained that the Council must first determine whether it would like to accept the project for further study. If so, members must decide if the Council as a whole will work on the project or whether it is more appropriate to refer it to one of the standing committees.

**MOTION:** Council member Ptacek moved, seconded by Council member Shriner, to accept the project and refer it to the Appellate Procedure Committee for further study and a recommendation. Motion approved with Council members Roggensack, Ott and Risser abstaining.

### **B. Uniform Interstate Depositions and Discovery Act**

The Council discussed whether it should consider the Uniform Interstate Deposition and Discovery Act (UIDDA) for possible recommendation for adoption in Wisconsin. Attorney Southwick explained that this issue was brought to her attention by a member of the Uniform Law Commission who was aware that the Council has previously submitted a successful supreme court rule change petition regarding conducting out-of-state depositions. Prior to the meeting, she circulated a copy of the rule changes previously drafted by the Council, as well as an article from *Wisconsin Lawyer* explaining the 2008 changes, and a copy of the UIDDA.

Council member Shriner suggested it would be appropriate for the Council to consider the uniform act, noting that the Council's previous amendments are now almost five years old. Council member Roggensack asked how the UIDDA compares to the federal discovery rules. Council member Stephens stated that the notes indicate that the UIDDA was based in many respects on Federal Rule 45. Council member Weber observed that Justice Prosser served on the UIDDA drafting committee. He suggested that if the Council accepts the project, Justice Prosser should be invited to serve as an ad hoc member of the group that is asked to study it. Council member Gleisner supported further study of the issue because adoption of the uniform act may result in reciprocity with other jurisdictions.

Attorney Southwick explained that if the Council accepts the project, the full Council could study the issue or refer it to a committee, such as the Evidence & Civil Procedure Committee.

**MOTION:** Council member Shriner moved, seconded by Council member Gleisner, to accept the project and refer it to the Evidence & Civil Procedure Committee for further study and a recommendation. Motion approved with Council members Roggensack, Ott and Risser abstaining.

### **C. Chapter 885 Terminology Update**

Attorney Southwick explained that this request seeks to replace the term "videotape" throughout Chapter 885. The request came from an attorney who also owns a court reporting service. He believes the term "videotape" is out-dated and should be replaced with language such as the terminology used in the federal rules.

Members observed that the term "videotape" is used throughout the statutes, and not just in Chapter 885. Council member Stephens suggested that this project might be more appropriate for the Legislative Reference Bureau so that consistency is maintained by making the change throughout the statutes. Council member Ott stated that there is a joint Legislative Council committee that does statutory clean-up work at the end of each session. He suggested that this proposal might be appropriate for that committee to review.

Council member White asked whether the proposal amounts to a substantive change in the statutes. Council member Kuczenski suggested that in this case, it appears to be a request to change the terminology only, with the definition remaining the same. Council member Shriner stated that Chapter 885 is generally out-dated and at some future time, the Council may want to consider a revision of the entire chapter. In particular, he noted that many of the provisions should be consolidated with the discovery rules to avoid having essentially a second set of rules regarding depositions.

The Council agreed by consensus to ask the Legislative Council committee to consider updating the term "videotape" in Wisconsin Statutes.

#### **D. Size and Number of Briefs in Multiparty Cases**

In a recent case, the court of appeals noted that "there is some ambiguity in the appellate rules relating to the size and number of briefs that may be filed in multiparty cases because, while Wis. Stat. Rule 809.19(5) explicitly authorizes co-appellants to file either separate or joint briefs, there is no companion provision explicitly authorizing co-respondents to file joint or separate briefs, and nothing that explicitly addresses whether a single respondent can file a separate responsive brief to each brief filed by a separate appellant or group of appellants, or whether an appellant can file a separate reply brief to each respondent's brief filed." *Henshue Construction, Inc. v. Terra Engineering & Construction Corp.*, 2012AP1038, August 21, 2012 Order.

Council member Shriner stated that this is an issue that arises quite often in complex multiparty litigation, and he supported acceptance of the project. Council member Weber noted that the *Henshue* order was issued by a single judge. He suggested that there may be a difference in opinions among appellate judges and consensus on a rule may be difficult to achieve. Council member Blanchard suggested that the current rules are ambiguous so there is the potential for inconsistency in application. Further study by the Appellate Procedure Committee may be helpful.

**MOTION:** Council member Shriner moved, seconded by Council member White, to accept the project and refer it to the Appellate Procedure Committee for further study and a recommendation. Motion approved with Council members Roggensack, Ott and Risser abstaining.

#### **IV. Discussion/Action Regarding Proposed Amendments to the Rules of Criminal Procedure**

Council member Schultz stated that Attorney Southwick and Council member Stephens made a presentation to the Chief Judges over the summer to provide a summary of the changes contained in the bill. Council member Schultz and Attorney Southwick are scheduled to present the bill to the criminal law section of the State Bar in December.

Attorney Southwick stated that over the summer, she forwarded all the amendments that were approved by the Council during the previous year to the Legislative Reference Bureau (LRB) so that they can update the bill. She also requested that the LRB prepare the analysis. The LRB drafting attorney stated that the amendments have been made and she is working on the analysis. She is also reviewing the bill to determine whether legislation adopted during the previous session will impact any provisions in the bill.

Council members Schultz, Stephens, and Weber are reviewing how to amend the cross-references in a statute that has been split it into two provisions (s. 974.09). Once they make a determination, they will provide a recommendation to the LRB. If their recommendation results in any substantive changes, they will bring those back to the full Council, but at this point it appears to be a technical issue limited to determining the appropriate cross-references.

#### **V. Discussion and/or Action Regarding Presentence Investigation Report Bill**

Attorney Southwick reported that the final presentence investigation report (PSI) bill has been completed by the LRB and it contains the analysis, so it should be ready for introduction when the legislature begins its new session. Attorney Southwick distributed a new case (*State v. Melton*, 2012 WI App 95), which lends further support for some of the revisions contained in the Council's bill.

During the previous session, members agreed to move the PSI bill simultaneously with the criminal procedure bill. However, the criminal procedure bill is not ready yet. Attorney Southwick asked the Council for guidance on how to proceed with the PSI bill. Council member Risser noted that the LRB's analysis indicates that the PSI bill will have a fiscal impact. He suggested that a fiscal estimate would be the next step. Members discussed whether to request a fiscal estimate on the PSI bill, or whether to wait until the criminal procedure bill is also ready. Council member Risser recommended that the Council continue to move forward on the bill that is completed, and not wait for the criminal procedure bill. Council member Weber suggested that the district attorneys should be included in the groups asked to provide a fiscal impact estimate.

Council member Blanchard noted that the PSI bill allows the use of first name and last initial in appellate briefs and appendices. The Appellate Procedure Committee is currently working on a draft proposal to prohibit the use of victim's names in appellate briefs. Council member Stephens stated that the PSI report is a confidential document. The requirement to use first name and last initial is consistent with the current briefing rules for confidential matters.

Members discussed whether the PSI bill should be held until the Appellate Procedure Committee makes a recommendation regarding protecting crime victim identity in appellate

cases. Council member Risser stated that amendments can be made to the PSI bill by a legislative committee if minor changes are needed after introduction.

MOTION: Council member Risser moved, seconded by Council member Weber, to ask the Legislative Reference Bureau to move forward on the bill by requesting a fiscal estimate to prepare it for introduction. Motion approved with Council member Blanchard opposed.

## **VI. Discussion and/or Action Regarding Supreme Court Rules Petition 12-03 Relating to Inadvertent Disclosure of Protected or Privileged Information**

Attorney Southwick reported that on September 19, 2012, the Wisconsin Supreme Court held a public hearing on the Judicial Council's Rule Change Petition 12-03. The hearing was followed by an open administrative conference of the court. At the conference, the court unanimously approved the Council's rule change petition. However, the court requested that the Council make some minor amendments to the Judicial Council Notes that accompany the amendments. The Notes reference the federal rules upon which the amendments are based, and refer to the federal Advisory Committee Notes that accompany those rules. The court asked the Council to incorporate direct quotes from the relevant portions of the Advisory Committee Notes into the Council's own Notes to be published with the rules.

At today's committee meeting, the Evidence & Civil Procedure Committee will review a draft of the amended Judicial Council Notes. If approved by the committee, this issue will be on the Council's next agenda for further review and discussion. If the Council is able to approve amended Notes at its October 19th meeting, court staff believes it is possible to meet the publication requirements to have a January 1, 2013 effective date for the new rules. If not, the effective date may be pushed back to July 1, 2013.

The court also requested that the Council consider the issue of applicability. It is generally agreed that because the proposed rules are purely procedural, they will apply to cases that are on-going at the time of the effective date, but the court would like a recommendation regarding language to address that point.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Attorney Southwick announced that Council member Blanchard is the new chair of the committee. The Appellate Procedure Committee met over the summer and continued to discuss protecting victim identity in appellate documents that are publically available via the internet. A draft of proposed rules was circulated to potentially interested groups over the summer for their comments. At today's meeting, the committee will discuss the feedback it received on the proposed rules.

### **B. Criminal Procedure**

Attorney Southwick announced that Council member Stephens is the new chair of the committee. The committee met over the summer, and members began discussing substitution of the judge in termination of parental rights (TPR) cases. The committee identified several areas where more information was requested, including how frequently multiple substitutions occur in TPR cases. The committee has also been assigned projects such as warrants for GPS tracking, plea withdrawal and the definition of “presence” in the criminal code. The committee will meet on October 3, 2012 to continue discussing these issues.

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

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee continues to discuss whether to codify the holding in *Alt v. Cline*, 224 Wis.2d 72, which created a privilege permitting experts to refuse to testify in certain circumstances. The committee met over the summer to finalize a rule draft and circulate the draft for comments from potentially interested groups. The committee has received a request to extend the deadline for comments so that the litigation section of the State Bar can provide feedback. Therefore, the committee will likely postpone further discussion until next month. At today’s meeting, the committee will focus on responding to the supreme court’s request to amend the Judicial Council Notes in Petition 12-03. The committee will also continue its discussion of s. 906.09, impeachment by prior conviction.

Council member Weber reported that there is currently an appeal pending involving the Marshfield Clinic’s request for expert witness fees in a criminal case in which a doctor at the clinic was called to testify even though the doctor was called as a fact witness, not an expert. The circuit court denied the request, and there are jurisdictional issues associated with the appeal. He will keep the Council apprised of the status of the case.

## **VIII. Other Business**

### **A. PPAC Liaison’s Report**

Council member Roggensack reported that the major focus of PPAC’s last meeting was the court’s biennial budget.

### **B. Council Attorney’s Report**

#### **1. 2013-15 Budget**

Attorney Southwick distributed copies of the Council’s 2013-2015 biennial budget request that she submitted to the Executive Budget office by the September 17, 2012 deadline. As directed by the Governor, the Council’s budget request contains only standard budget adjustments for salary/fringe benefits and rent. Those adjustments were calculated by the Council’s budget analyst at the Department of Administration (DOA) using a standard formula. Attorney Southwick also worked with Chair Bertz and the budget staff in the Director of State Court’s office to prepare a request to restore the \$58,000 GPR funding that was reallocated to PR funding transferred from the Director of State Courts and the State Law Library. If granted, this request will restore the Council to the funding level it maintained prior to the 2011-2013 budget.

Attorney Southwick explained that there are many different documents that make up the budget request, as listed in the table of contents. She drafts the Cover Letter, Description, Mission, Goals, Performance Measures, and Organization Chart. Because the Judicial Council is such a small agency, it pays the Department of Administration to provide accounting services. As part of those services, the Council's DOA analyst prepares the actual numbers and creates the Agency Total by Fund Source, Agency Total by Program and Agency Total by Decision Item. This year's budget instructions directed agencies to submit a zero-growth budget, which means a request that maintains the current budget level, factoring in anticipated changes in costs for salary/fringe benefits and leased space. DOA has established formulas that they use to calculate those adjustments for all agencies. (Those calculations can be found on pages 16-21 of the budget.) With the exception of the two anticipated adjustments for continuing position salary and fringe benefits and full funding of the lease as calculated by the Council's DOA analyst, the current budget is the same as the budget submitted by the Council for 2011-2013 (which was the same as the Council's 2009-2011 budget request).

Council member Roggensack stated that the Council should be more involved with the budget process. Attorney Southwick explained that the Council's budget proposal is always due before the Council's first meeting of the year, so the Council would need to meet over the summer to work on it prior to submission. Council member Shriner suggested that the Executive Committee could meet over the summer to work on the budget request. Council member White suggested that a draft based on previous Council budgets could be presented to the Council in the spring for input from members. The Executive Committee could then work over the summer to make minor adjustments to it.

MOTION: Council member Stephens moved, seconded by Council member Gleisner, to place an item on the Council's May agenda in even numbered years to discuss potential budget requests and establish a budget procedure. Motion approved unanimously. Council member Weber asked Attorney Southwick to prepare a brief memorandum explaining the budget process.

MOTION: Council member Shriner moved, seconded by Council member White, to ratify the Council's 2013-2015 budget request. Motion approved unanimously.

## 2. Judicial Conference

The Judicial Conference is November 7-9 and Attorney Southwick plans to attend. She will work with Judge Ptacek to draft the Council's written report to the Judicial Conference.

## 3. Judges' Manual

The Director of State Court's office asked to include a description of the Judicial Council and its duties in the 2012 Judges' Manual. Attorney Southwick provided the requested information.

## 4. Public Records and Open Meetings Law

Attorney Southwick reminded members that the Judicial Council is a governmental body subject to the open meetings and public records laws. All meetings must be properly posted to give the public notice of the topics to be discussed. She also explained that as long as members

provide her with copies of any records or documents that they generate in their capacity as council members, she maintains copies so that members do not have to individually preserve Judicial Council information that maybe subject to the public records laws.

#### **IV. Adjournment**

The Council adjourned by consensus at 11:25 a.m.