

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
October 16, 2009

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

MEMBERS PRESENT: Chair Marla J. Stephens, Vice-Chair Beth E. Hanan, Thomas W. Bertz, James C. Boll, Honorable Ann Walsh Bradley, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Robin Ryan, Professor David E. Schultz, Rebecca St. John, Senator Lena Taylor, Honorable Maxine A. White.

MEMBERS EXCUSED: Michael R. Christopher, Honorable Patricia S. Curley, Honorable George S. Curry, Allan M. Foeckler, Kathleen A. Pakes, A. John Voelker, Honorable Mary K. Wagner.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Eric Peterson, Chief of Staff for Senator Taylor; Kate Battiato, Office of Representative Hebl.

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

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

**II. Approval of September 18, 2009 Minutes**

Council member Schultz requested clarification in the minutes to reflect that he is not generally opposed to a bias rule, but simply does not feel such a rule is necessary to replace the Deadman's statute. Vice-Chair Hanan noted that "the" should be "to" in the first line at the top of page three.

MOTION: Council member Hebl moved, seconded by Council member Boll, to approve the minutes as amended. The motion was approved unanimously.

**III. Discussion and/or Action Regarding Wisc. Stat. § 904.085 (4) (e), Communications in Mediation**

Under the current rule, a hearing regarding the confidentiality of evidence admissible during mediation is not required to be conducted in camera. At the previous meeting, Judge Robert Haase brought a proposal to the Council to amend the rule to require an in camera hearing to protect potentially confidential information from being revealed in open court prior to a ruling on its admissibility. Attorney Southwick prepared a draft rule change petition to amend Wisc. Stat. § 904.085 (4) (e) to require that the hearing be conducted in camera. The draft was sent to members for review prior to the meeting.

Attorney Southwick noted that Wis. Stat. § 807.04 requires "all hearings at which oral testimony is to be presented, shall be held in open court." She indicated that this may potentially conflict with the proposed amendment to section 904.085 if an in camera hearing includes oral

testimony. However, she compared this provision to Wis. Stat. § 757.14, which requires that “[t]he sittings of every court shall be public and every citizen may freely attend the same...” The supreme court specifically recognized that taking certain evidence in camera does not violate section 757.14 or 757.70 (providing for public trials and requiring that hearings before court commissioners shall be public). *State ex rel. Ampco Metal, Inc. v. O’Neill*, 273 Wis. 530, 78 N.W.2d 921 (1956). She believes the court’s inherent power to proceed in camera would also be applicable to section 807.04.

Several Council members expressed concern that this amendment may allow greater disclosure of confidential information from mediation. Attorney Southwick explained that the provision allowing disclosure in other cases “to prevent a manifest injustice” already exists, and that hearings to make that determination already occur. The only change proposed by the petition would require that those hearings be held in camera. This change will potentially help keep mediation material confidential by preventing public disclosure until after the court has ruled that it is admissible. If the court does not find the evidence admissible, its confidentiality is preserved under this rule change.

Vice-Chair Hanan suggested the addition of public domain cites in the petition, and Attorney Southwick will confer with her to make those changes.

**MOTION:** Council member Bertz moved, seconded by Council member Taylor, to approve the rule change petition, and direct Attorney Southwick to file it with the supreme court on behalf of the Council. The motion was approved, with Council members Boll and La Fleur opposed, and Council member Bradley abstaining.

#### **IV. Discussion and/or Action Regarding Parliamentary Rules and Procedures for Conducting Meetings**

Chair Stephens stated that this item is on the agenda at the request of former Council member Weber. As the new representative from the Department of Justice, Council member St. John renewed the request that the council adopt rules of procedure. Attorney Southwick distributed several copies of the Modern Rules of Procedure, published by the American Bar Association.

**MOTION:** Council member St. John moved, seconded by Council member La Fleur, to adopt the Modern Rules of Order as the parliamentary rules of procedure used to conduct the meetings of the Judicial Council.

Council member Bradley expressed concern that procedural rules can have the potential to stifle debate or prevent full discussion. Chair Stephens stated that the Modern Rules of Procedure are used by the State Bar’s Board of Governors and she does not believe that has been a problem. She explained that these rules were selected because are much easier to understand and follow than some other forms of parliamentary procedure. She added that this is the informal model that she currently uses to run the Council’s meetings, and in particular, the option to approve by consensus rather than requiring motions and a formal vote when everyone is clearly in agreement. She clarified that the Council has not formally adopted any procedural rules.

Council member Taylor offered to provide a comparison between the Modern Rules of Order and Robert's Rules of Order. Chair Stephens suggested that perhaps the members should review the proposed rules first, to see if additional information is necessary. She suggested that members who are unfamiliar with these rules and wish to read them take a copy, and return it at the next meeting so that others will have a chance to read it.

**MOTION:** Council member Hebl moved, seconded by Council member La Fleur, to table this item to allow council members to review the Modern Rules of Order prior to voting on this item. The motion was approved unanimously.

## **V. Discussion of Wisconsin Rules of Evidence**

Council member Leineweber introduced a discussion regarding Wis. Stat. § 904.12, statements by injured persons within 72 hours of the injury. He reminded the Council that Professor Blinka previously suggested that this rule be amended to eliminate confusion and move it to the section regarding hearsay. He contacted Professor Blinka to obtain additional clarification regarding issues he perceived with the rule. Based on that additional information, the committee determined that they could either recommend elimination of the rule, amendment to correct some of the issues identified by Professor Blinka, or suggest that the Council take no action. The committee concluded that the policy behind the rule has merit, so they opposed elimination. They were also unable to identify any problems with the application of this rule in actual practice, and saw no evidence that the courts were struggling to apply this rule. The committee concluded that an amendment would not be a good use of the Council's limited and valuable resources. Therefore, the Evidence & Civil Procedure Committee recommends that the Council take no action with respect to Wis. Stat. § 904.12. After discussion, the Council agreed with the committee's recommendation to take no further action with regard to this rule.

## **VI. Committee Reports**

### **A. Appellate Procedure**

Chair Stephens reported that the Appellate Procedure Committee is finalizing a recommendation concerning the presentence investigation amendments. It will be ready for review by the full Council in the near future.

### **B. Criminal Procedure**

Committee chair Schultz reported that the Legislative Reference Bureau (LRB) has completed drafting, and the subcommittee is awaiting clean copies of the bills. The subcommittee will be ready to meet to respond to LRB questions in the near future.

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

Committee chair Leineweber reported that in addition to their work on the rules of evidence, the committee members have continued to discuss the small claims matter involving calculation of “days” under chapter 799.

He further reported that the petition regarding discovery of electronically stored information has not been set for a hearing. Attorney Southwick distributed a request for comment from the litigation section of the State Bar. She suggested that the Council refer it to the Evidence & Civil Procedure Committee to respond.

Council member Hebl requested that a bill regarding small claims action be placed on the next agenda for discussion. Senator Taylor referenced several additional legislative topics that may be of interest to the Council, including pro se parties, perceptions by the court system regarding fathers, public defender eligibility standards and mortgage mediation. She will ask her staff to send additional information to Attorney Southwick.

## **VII. Other Business**

### **A. PPAC Liaison’s Report**

There was no PPAC Report.

### **B. Council Attorney’s Report**

Attorney Southwick reported that she gave a presentation to the State Bar’s Board of Governors regarding the Council’s pending rule change petition (No. 09-01) to incorporate the discovery of electronically stored information into the existing discovery rules, and anticipates attending the next meeting to provide some additional information. She will also be attending the up-coming Judicial Conference.

## **VIII. Adjournment**

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