



## STATE OF WISCONSIN – JUDICIAL COUNCIL

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### MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN February 16, 2018

The Judicial Council met at 9:35 a.m. in Room 328 NW, State Capitol, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair Thomas W. Bertz; Sarah Walkenhorst Barber; Diane Fremgen; Judge Eugene A. Gasiorkiewicz (by phone); William C. Gleisner; Christian A. Gossett (by phone by Assistant Reinke Mackensie); Duane Harlow; Devon Lee; Judge Scott Needham; John R. Orton; Dennis Myers; Benjamin Pliskie; Thomas L. Shriner; Steve Wright; Judge Robert P. VanDeHey; Senator Van H. Wanggaard (by phone); and Judge Jeffrey Wagner (by phone).

**MEMBERS EXCUSED:** Justice Annette Kingsland Ziegler; Sherry D. Coley; Representative Jim Ott;

**OTHERS PRESENT:** Erika Strebel, Wisconsin Law Journal; Julie Tessmer, State Law Library.

#### **Agenda Item I: Call to Order and Roll Call.**

Chair Bertz called the meeting to order at approximately 9:35 a.m. with Gleisner as Acting Secretary. Before proceeding to a discussion of the Agenda for this meeting, it was noted by Judge Gasiorkiewicz that there was no representative from the Supreme Court or the Court of Appeals at this meeting. However, Diane Fremgen noted that she was present for the Director of State Courts. Tom Shriner noted that he had heard that there would not be a new representative from the Supreme Court for the time being. Regarding the Court of Appeals, both Judge Gasiorkiewicz and Gleisner have written to Chief Judge Neubauer but have not heard back as of yet.

The Agenda for this Meeting was then addressed.

#### **Agenda Item II: Approval of January 19, 2018 Meeting Minutes.**

It was noted that the Minutes had been amended by the addition of a reference to the fact that Judge Wagner appeared at the January meeting by phone. Judge Gasiorkiewicz noted a punctuation change to the Minutes and Dennis Myers noted that he did not leave the meeting and that he voted in favor of Orton's motion to continue the Council for another six months. The Minutes were approved and Gleisner stated he would send out revised Minutes.

#### **Agenda Item III: Acknowledgement of the Distinguished Service of Judge Brian Blanchard and Recognition of his Service as both a Member and Vice Chair of the Council.**

It was agreed that Gleisner would prepare a proposed design of a plaque commemorating Judge Blanchard's service and seek bids for preparation of such a plaque. Gleisner will circulate the

proposed design to the members. Gleisner also proposed that voluntary contributions to paying for such a plaque would be welcome.

**Agenda Item IV: Discussion and/or Action Regarding Draft Petition and Supporting Memo concerning amendment to Wis. Stat. § 806.02. The Petition and Supporting Memorandum have been approved in principle by the Evid. & Civ. Pro. Committee, which asks the Council to likewise approve it in principle before the Evid. & Civ. Pro. Committee puts the draft in final form and return to the Council for final approval.**

Tom Shriner confirmed that the agenda item summarizes what the E & Civ. Pro. Committee requests. Tom reviewed the “lacuna” which the proposed petition and memo seek to correct. Tom noted that the current default judgment rule only permits a plaintiff to seek a default judgment. He noted that John Orton has prepared a good first draft and he wanted the Council to know that the Committee is working on this project. Tom said that the draft would be taken up in committee and a final draft will be returned to the Council for action. Tom noted that there are four court of appeals decisions which commented on this anomaly (they are in the draft furnished to the Council today). While Tom stated that this could be presented to the Legislature, he felt that this was the type of procedural issue that should go to the Supreme Court. Tom also pointed out there federal rules already require responses to counterclaims and cross-claims.

There was discussion of what “proof of service” would mean when dealing with a counterclaim or cross-claim. John Orton responded that this should not be a problem since a counterclaim or a cross-claim presuppose an existing action with identified parties and counsel who can be served.

Judge Gasiorkiewicz noted as a trial judge this correction will clear up a troubling gap streamline procedure before the Circuit Court. As Judge Gasiorkiewicz stated, “there is absolutely no reason why parties should not respond to counterclaims or cross-claims.” Judge Needham noted an error on page 8 of the draft memo, which will be corrected during the final markup of the draft in committee. The Chair returned this to the Evid. & Civ. Pro. Committee.

**Agenda Item V: Discussion and/or Action Regarding AB 773/SB 645, especially the Resolution which the Evid. & Civ. Pro. Committee has requested that the Council adopt and transmit to the Judiciary Committees of the Senate and Assembly.**

The following is the proposed resolution recommended by the Evid. & Civ. Pro. Committee:

On January 19, 2018, with Assistant Attorney General Harlow abstaining, the Evidence and Civil Procedure Committee voted to request that the Judicial Council issue the following resolution at its February 16, 2018 meeting:

WHEREAS ASSEMBLY BILL 773 WILL CHANGE A RULE ADOPTED BY THE SUPREME COURT ON DECEMBER 21, 2017 REGARDING CLASS ACTIONS;

AND

WHEREAS ASSEMBLY BILL 773 WILL ADOPT RULES OF DISCOVERY AND OTHER RULES OF CIVIL PROCEDURE WHICH ARE INCONSISTENT WITH THE CURRENT FEDERAL RULES OF CIVIL PROCEDURE;

NOW THEREFORE THE JUDICIAL COUNCIL RESPECTFULLY ASKS THE JUDICIARY COMMITTEES OF BOTH THE ASSEMBLY AND THE SENATE TO PROVIDE THE JUDICIAL COUNCIL WITH THE TIME AND OPPORTUNITY TO CARRY OUT THE COUNCIL'S STATUTORY DUTY PURSUANT TO WIS. STAT. 758.13 TO REVIEW AND VET THOSE PARTS OF ASSEMBLY BILL 773 WHICH ADDRESS THE RULES OF CIVIL PROCEDURE, AND PROVIDE THE COUNCIL'S POSITION THEREON TO THE SENATE AND ASSEMBLY JUDICIARY COMMITTEES.<sup>1</sup>

Tom Shriner began the discussion by noting that he was not a sponsor of the proposed resolution, although he voted for it because it identifies a problem faced by the Council. Tom went on to note that both Assembly Bill 773 and Senate Bill 645 have in them a number of items effecting litigation, some of them procedural and some of them substantive. Some of the procedural ones, and in particular the ones relating to the class action rule that we just proposed and the Supreme Court adopted a few months ago really, in an orderly system where the Judicial Council is functioning, are things where the views of the Judicial Council should matter. What we are saying is that with regard to procedural bills the Judicial Council would like the opportunity to be heard.

Gleisner noted that he attended both the Assembly and Senate Judiciary Committee meetings and there were a number of lawyers for and a few against. Gleisner stated that he testified that it would be useful to have lawyers from the Council look at bills such as 773 and 645 and give their input based on their practical experience. One of the things that bothered Gleisner a lot was the fact that both 773 and 645 were presented as adopting the federal rules of civil procedure. In fact, that is not the case. In 2010 there was a conference held at Duke University that resulted in the Duke proposals. There were at least five hearings held around the country on the Duke proposals and testimony was presented in person and by writing by several thousand people. In what came to be known as the Campbell Report in 2014 the U.S. Judicial Conference rejected the Duke Proposals and came up with amendments in 2015 which are now embodied in the existing federal rules of civil procedure. However, the proposed rules in 773 and 645 seek to go back and adopt the Duke proposals. It would be useful to have the Judicial Council weigh in on this sort of thing. Gleisner noted that there are not many lawyers on the Assembly and Senate Judiciary Committees and so the Judicial Council might be of some help in evaluating bills such as 773 and 645.

Senator Wanggaard stated that, given all the work done by the Judicial Council's study committee, it was necessary to look at what the Council suggested to the Supreme Court and was to go into force in July 1, 2018. The Senator said he did not understand why the class action rule was being changed even before it went into force, especially since the class action rule was adopted unanimously by the Supreme Court. The Senator noted that this was a huge bill and the fact that Council members came to testify added value to the process. When things are finalized the Senator said the Council would get copies. The Senator was asked if he expected this to be passed by March or April. The Senator responded that there are two more days as of the date of the meeting (2-16). The Senator said to look for passage out of committee by the middle of March and action by the full Legislature shortly thereafter. Judge Gasiorkiewicz asked about the

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<sup>1</sup> Following the 1-19-18 EC&P meeting, it was learned that an identical version of Assembly Bill 773 had been introduced in the Senate as Senate Bill 645. Therefore, the proposed Resolution authorized at the 1-19-18 EC&P meeting and presented to the Council on 2-16-18 will refer to both Assembly Bill 773 and Senate Bill 645.

civil rights statute of limitations. The Senator responded that it is back to six years, but he will check on this.

Gleisner asked the Senator if he meant by the middle of March the Legislature will have acted or if the committees will have acted. The Senator stated he thought the Legislature will be done with these bills by the middle of March.

Tom Shriner asked what the reaction of the Supreme Court (or the Director of State Courts) had been to the mandatory appeal of class actions, which could slow down a lot of litigation significantly. The bill provides that if a class is certified (or not) an appeal would be automatic with a 180 day delay of litigation. The Senator said that he understood that the 180 or 90 day delays referred to discovery and not appeals.

Gleisner asked if the Senator had any objections to the proposed resolution to the Judicial Council. The Senator said no, he thought the resolution was good but he and Ott would have to abstain. The Senator said Gleisner was right that there are no attorneys on the committees, but there are lawyers from outside influences.

Gleisner noted that no judges seem to have been approached about either 773 or 645. The Senator said that he had talked with judges (especially from the Judicial Council).

Judge VanDeHey raised an issue about the proposed resolution. He expressed a concern that the resolution should not be modified so that it addresses future acts, and not limit it to 773 and 645.

After conferring with the Senator, Gleisner proposed the following amendment:

WHEREAS ASSEMBLY BILL 773 WILL CHANGE A RULE ADOPTED BY THE SUPREME COURT ON DECEMBER 21, 2017 REGARDING CLASS ACTIONS;  
AND  
WHEREAS ASSEMBLY BILL 773 WILL ADOPT RULES OF DISCOVERY AND OTHER RULES OF CIVIL PROCEDURE WHICH ARE INCONSISTENT WITH THE CURRENT FEDERAL RULES OF CIVIL PROCEDURE;

NOW THEREFORE THE JUDICIAL COUNCIL RESPECTFULLY ASKS THE JUDICIARY COMMITTEES OF BOTH THE ASSEMBLY AND THE SENATE TO PROVIDE THE JUDICIAL COUNCIL WITH THE TIME AND OPPORTUNITY TO CARRY OUT THE COUNCIL'S STATUTORY DUTY PURSUANT TO WIS. STAT. 758.13 TO REVIEW AND VET ASSEMBLY BILL 773, SENATE BILL 645 AND ALL FUTURE BILLS WHICH ADDRESS THE RULES OF CIVIL PROCEDURE, AND PROVIDE THE COUNCIL'S POSITION THEREON TO THE SENATE AND ASSEMBLY JUDICIARY COMMITTEES.

MOTION: GLEISNER MOVED TO ADOPT THE RESOLUTION AS AMENDED.

Dennis Myers seconded.

With Sarah Barber and Senator Wanggaard abstaining, the Resolution as amended passed. Gleisner will distribute the Resolution to the Senate and Assembly Judiciary Committees.

**Agenda Item VI: Discussion and/or Action Regarding Uniform Unsworn Domestic Declarations Act ("the UUDDA").**

The title on the agenda is misleading. There are three formats dealing with unsworn declarations in lieu of affidavits. Several years ago, the Legislature adopted the Uniform Unsworn Foreign Declarations Act that allows people outside the U.S. to make unsworn declarations under penalty of false swearing with the same force as an affidavit in the U.S. The Uniform Law Commission recommended that we adopt the Uniform Unsworn Domestic Declarations Act, which allows a similar process within the U.S. The Committee looked at it and said we like door three, the Uniform Unsworn Declarations Act, which applies to both foreign and domestic declarations. That is what was sent out, LRB 3993, which is what the Committee actually recommends. This is especially useful where motions for summary judgment are involved. This act facilitates and makes less expensive the summary judgment process.

Shriner said that the Committee recommends that the Legislature adopt this Act. While this is something the Supreme Court could do, the Committee believes that it is better to draft an act for consideration by the Legislature. Senator Wanggaard was asked how, in the absence of April Southwick, we can best help the Legislature understand the reasons for such a recommendation? Should we do it via a petition and supporting memo? Should we submit that to the Judiciary Committees, or to the President of the Senate and the Speaker of the Assembly?

Senator Wanggaard responded that the petition/memo approach would work well. He suggested sending it to the President of the Senate, the Speaker of the Assembly and to the Majority Leaders in both houses.

MOTION: GLEISNER MOVED TO RESUBMIT LRB 3993 FOR FINAL WORKUP BY THE EVID. & CIV. PRO. COMMITTEE.

Second by Dennis Myers.

Motion carried unanimously, with the same abstentions by Senator Wanggaard and Ms. Barber.

**Agenda Item VII: Based on Attorney Shriner's discussion of the U.S. Supreme Court's decision in the *Water Splash* decision, consideration of referring to the Evid. & Civ. Pro. Committee for Potential Amendment to Wis. Stat. § 801.11 so as to Permit Service of Summons and Complaint by Mail in Countries that Permit such Service under The Hague Service Convention and Amendment of §§801.15(2)(a) and 893.02 to Permit Enlargement of Time to Accomplish Service in Countries that Do not Permit Service by Mail.**

Tom Shriner explained that this involves a decision of the U.S. Supreme Court last May interpreting the Hague Service Convention, to which the U.S. and most of the world are parties. This case came out Texas. Essentially, the Court held that, in a country that is a party to the Convention and allows service of process by mail, a state court in this country can avail itself of this means of starting a lawsuit. There is only one problem. There are only two states that do not allow service of process by mail, and Wisconsin is one of them. This presents a problem in the case of overseas litigation. The Legislature would have to change this, at least where there are overseas lawsuits. There will be stakeholders who will want to be heard on this. The principal beneficiaries of such a change would be Wisconsin companies suing for payment.

Tom pointed out that there is another problem peculiar to Wisconsin. Our statutes require service of initiating process within 90 days. However, this presents a real problem overseas, especially where the statute of limitations is about to expire. It will be necessary to find a method for relaxing the rule that requires that service be accomplished within 90 days of filing, but only for overseas litigation. This will present several problems for the Evid. & Civ. Pro. Committee: How

do we conduct comprehensive research of the laws in other states, or countries? How do we seek input from interested stakeholders?

Ben Pliskie pointed out a problem where private parties are involved. For example, in divorces spouses sometimes flee the country and the petitioning spouse's lawyer doesn't find out about it until the fugitive has been gone for an extended period of time, and this can make it very difficult to complete service within the 90 days allowed.

MOTION: DENNIS MYERS MOVES TO REFER THE *WATER SPLASH* ISSUE TO THE EVID. & CIV. PRO. COMMITTEE FOR STUDY.

Seconded by Gleisner.

Motion carried unanimously, with the same abstentions by Senator Wanggaard and Ms. Barber.

**Agenda Item VIII: Discussion and/or Action concerning Judge VanDeHey's proposed correction of Wis. Stat. §893.783, thus supplying an inadvertently deleted venue provision regarding prisoner actions.**

According to Judge VanDeHey, the legislation that has been proposed is called the prisoner litigation bill and, because of its name, there has been difficulty in getting sponsors. The intent of the legislation is to put all the provisions relating to prisoner litigation in one chapter. It was not intended to change the existing law in any way, but instead was intended to codify existing law. After the bill had been prepared it was discovered that a venue provision had been inadvertently omitted when the Council approved it. The purpose of the revised bill is to reinsert the venue provision at the top of page 7 of the bill.

Judge VanDeHey also reported that he did meet with Mr. Van Hecke of the Judicial Commission and it appears that the Commission cannot do anything to assist the Council, including the sharing of staff with the Council.

MOTION: JUDGE VANDEHEY MOVES TO APPROVE THE REVISED PROPOSAL AS PRESENTED TO THE COUNCIL TODAY.

Seconded by Dennis Myers.

Further Discussion: The Department of Justice will not oppose the bill, according to Assistant AG Harlow (although the Justice Department will abstain). Senator Wanggaard weighed in and asked if the Council approves the bill. Tom Shriner asked the Senator if the Council should put the bill together in the form of a petition and memo and submit it to the Legislature, and the Senator agreed. The Criminal Committee will place the bill in that form for presentation to the Legislature.

Motion carried unanimously, with abstentions by Senator Wanggaard, Ms. Barber and Assistant AG Harlow.

**Agenda Item IX: Discussion and/or Action regarding the now abandoned offices of the Judicial Council, including whether the Council should ask the State Law Library to remove the books and papers now residing in that office. Agenda Item X: Discussion and/or Action regarding how to handle U.S. mail to the Council, as well as emails to the Council and whether there should be a new Council website.**

Attorney Gleisner recommended that Agenda Items IX and X be discussed in tandem. He acknowledged the presence of Julie Tessmer from the State Law Library. Glesiner asked her to address the Council concerning the possible role of the Council.

Ms. Tessmer first pointed out that the State Law Library had been hosting a portion of the Council materials for a number of years and actually maintains the archives which have been categorized and indexed by Library staff, and the staff hopes to digitize these eventually. The Law Library has a portion of its website dedicated to the Council activities. The Law Library could easily incorporate the Council's website into the Law Library's website.

**MOTION: GLEISNER MOVED THAT HE BE GIVEN AUTHORITY TO WORK WITH JULIE FOR THE PURPOSES OF TRANSFERRING THE MATERIALS IN THE OLD OFFICE TO THE LAW LIBRARY AND FURTHER TO WORK WITH THE LAW LIBRARY'S WEB MASTER TO INSURE A TRANSFER OF THE COUNCIL'S WEBSITE TO THE LAW LIBRARY'S WEBSITE.**

Dennis Myers seconded.

Further Discussion: Ms. Tessmer also noted that the Law Library has access to several 50 state libraries whereby they could assist with comprehensive surveys of laws from other jurisdictions. And the reference staff could assist with that.

Ms. Tessmer stated "we serve the Legislature, we serve judges, we serve citizens." Ms. Tessmer said she would clear it with the Court but she sees the Council as just one more of the Library's user groups." Gleisner opined that he believes that neither the Court nor the Legislature will stand in the way of the Council doing what it can to comply with its duties under Wis. Stat. §758.13 and to otherwise maintain its archives.

Gleisner asked if the Library could give the Council an email address. Ms. Tessmer said she thought she could do that. Judge Needham cautioned that the Library's budget is part of the Court's budget and that he doubted that the Library could do anything to help the Council without permission from the Court. Gleisner noted that the Library has reference librarians who work for all citizens of Wisconsin.

Motion carried unanimously, with abstentions by Senator Wanggaard, Ms. Barber and Assistant AG Harlow.

**Agenda Item XI: Discussion and/or Action as to how to select a replacement for Judge Blanchard as Vice Chair of the Council.**

A nominating committee was appointed consisting of Tom Bertz, Dennis Myers and Ben Pliskie.

Before adjournment, Judge Gasiorkiewicz raised the issue of help from the two law schools. Tom Shriner said that he had talked with Professor Wright and they believe that interns and law clerks don't work too well for this kind of assignment.

**Agenda Item XII: Adjournment.**

The meeting adjourned by consensus as approximately 11:30 a.m.