

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
March 19, 2010

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

**MEMBERS PRESENT:** Chair Beth E. Hanan, Vice-Chair Marla J. Stephens, Allan M. Foeckler, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Robin L. Ryan, Professor David E. Schultz, Rebecca St. John, Honorable Mary K. Wagner, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Thomas W. Bertz, James C. Boll, Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable Patricia S. Curley, Professor Jay Grenig, Senator Lena Taylor, A. John Voelker.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Kate Battiato, Office of Representative Hebl; and Christopher Gibbs, Office of Senator Lena Taylor.

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

Chair Hanan called the meeting to order at 9:50 a.m.

**II. Approval of February 19, 2010 Minutes**

**MOTION:** Vice-Chair Stephens moved, seconded by Council member La Fleur, to approve the minutes. Motion approved unanimously.

**III. Discussion and/or Action Regarding Amended Petition Re Discovery of Electronically Stored Information (No. 09-01)**

Attorney Southwick reported that on January 21, 2010, the supreme court held a public hearing on Judicial Council rule change petition 09-01, discovery of electronically stored information. Evidence & Civil Procedure Committee members Leineweber, Sankovitz, and Gleisner, joined by Attorney Southwick, presented the petition on behalf of the Council. Attorneys Tim Edwards, Mark Foley and Bruce Olson also spoke at the hearing; however, since they had all previously filed written comments, their remarks were anticipated.

At the administrative conference following the hearing, the court requested that the Council file an amended petition to incorporate language more closely mirroring three of the federal discovery rules, and adding Judicial Council Notes containing the Federal Advisory Committee Notes. They also suggested that the Council reconsider a rule regarding discovery conferences. The court requested that the amended petition be filed within two or three months.

The drafting group prepared an amended petition, which was approved by the Evidence & Civil Procedure Committee at its last meeting. The amended petition was distributed to council members prior to the meeting. It includes the requested federal rules language, relevant

excerpts from the Advisory Committee Notes, a provision to allow discovery conferences by order of the court on the court's own motion or that of either party, as well as some further revision to s. 805.07, subpoenas. The original petition added some provisions from the federal rules regarding subpoenas, but did not remove the current procedures. This change resulted in two alternative procedures by which a third party could oppose a subpoena. Although no group objected to the original proposal at the hearing and the court did not raise it as an issue, the drafting group identified it as a change that could cause confusion in practice. They revised this section by removing the alternative procedure borrowed from the federal rules.

**MOTION:** Council member La Fleur moved, seconded by Council member Leineweber, to approve the amended petition regarding discovery of electronically stored information, and authorize Attorney Southwick to file it with the supreme court. Council member La Fleur accepted a friendly amendment to add that the Council requests a July 1, 2010 effective date. Motion approved unanimously.

#### **IV. Discussion Regarding Assembly Bill 810, Creating an Evidentiary Privilege for Communications to Veteran Mentors**

Council member Hebl introduced a discussion regarding AB 810, which seeks to create an evidentiary privilege in veterans court for communications between veterans and veteran mentors. The Assembly Judiciary Committee recently held a public hearing on the bill and there was no opposition. He asked for input and comments from the Council regarding the proposed bill.

Chair Hanan suggested that section (3) of the bill might be clearer if it stated, "The veteran mentor may claim the privilege, but only on behalf of the person." This language is found in two of the three similar privilege rules, and this slight modification would clarify that it is not the mentor's privilege.

Council member Ptacek expressed concern that the bill may open the door for other similarly situated volunteers to raise similar interests. He cited examples such as CASA (Court Appointed Special Advocates) volunteers, and pretrial intake personnel who talk with individuals in jail. Council member Leineweber agreed, adding that there has been a proliferation of privileges over the years, and more privileges frustrate the ascertainment of the truth in a court proceeding. A balance is required to make certain it is worth the price to promote the good that comes from maintaining the confidence. Council member Leineweber stated that the addition of privileges erodes the ability to subpoena a witness and determine the facts. Council member White observed that there are some inherent differences between the veteran mentors and the usual court program mentors and volunteers, including the fact that the veteran mentor is court-appointed, and must complete a judicially-approved training program. She suggested that the definition of veteran mentor could be expanded to give the position more separation from the general court helpers.

Vice-Chair Stephens explained that veterans court proceedings are not strictly adversarial, and are similar in nature to the drug intervention courts. She added that neither the prosecutor, defense counsel nor the judge have the same role in this type of proceeding as in a

traditional adversarial setting. The goal is to divert the veteran from the criminal justice system. She asked council members what exception might be missing from the proposed privilege. Council member La Fleur raised the example of a communication to the veteran mentor that a mentee is intending to break the law. Council member St. John stated that confidentiality is not the same thing as an evidentiary privilege, so the bill does not prevent the mentor from reporting such an intention. Attorney Southwick reported that the testimony at the Assembly Judiciary Committee hearing was that the agreement signed by the mentee would include a waiver allowing disclosure of information such as the intention to commit a crime or harm to self, but there is no requirement that the agreement be signed prior to entering into the mentor relationship. As drafted, the bill provides that all information shared prior to entering into the agreement would be privileged. In contrast, attorney-client and physician-patient privileges include statutory exceptions for information such as the intention to commit a crime or harm to self. Attorney Southwick added that other groups who are granted privileges are also generally governed by specific professional duties and obligations which address matters such as confidentiality, and may also require them to report certain types of information, such as child abuse.

Council member Hebl appreciated the discussion and invited fellow council members to submit, as individual citizens, any written suggestions that they may have regarding the bill.

#### **V. Discussion Regarding SCR 81, Compensation to Court-Appointed Attorneys**

Chair Hanan reminded the Council that both a workgroup and the full Judicial Council previously discussed whether the attorney rate in SCR 81 should be reviewed by the supreme court. The Council last discussed this issue in November, 2009, and identified some questions to address before continuing with the project. Attorney Southwick began obtaining the additional information and then learned that another group was planning to seek review and adjustment of the rate. A group of lawyers recently filed a supreme court petition requesting that the court increase the rate in SCR 81 from \$70 to \$80 per hour. Attorney Southwick distributed a copy of their petition and supporting memorandum prior to the meeting.

Council member La Fleur stated that the petition is very good, although it does not incorporate guidance for exceeding the rate set forth in the rule. She reminded the Council that the workgroup had proposed adding the factors set forth in SCR 21:1.5 to provide criteria for the court to exercise its discretion to set a fee above the minimum rate. Chair Hanan stated that the Council has not been asked to take any action with regard to the petition. Additionally, the court has a record of Council discussion on this topic as contained in the minutes, including the discussion regarding incorporating the criteria in SCR 21:1.5.

Council member Hebl added that the Assembly Judiciary Committee passed a bill to raise the State Public Defender (SPD) rate paid to private attorneys from \$40 to \$70 per hour, although they do not expect it to pass the Assembly given the current budget. Council member Ptacek stated that the proposal in the supreme court petition really impacts local governments, particularly counties. Council member Leineweber added that regardless of the economy, the constitution requires effective representation. Vice-Chair Stephens stated that a bill was recently

passed to increase the public defender eligibility standards. It also allows the SPD to hire 40 more staff attorneys.

The Council agreed by consensus to take no further action on this issue unless asked to do so by the court.

## **VI. Committee Reports**

### **A. Appellate Procedure**

Committee chair Stephens reported that at today's Appellate Procedure Committee meeting, the committee anticipates finalizing its recommendation concerning amendments to the statutes regarding presentence investigations. She expects that the proposal will be ready for review by the full Council prior to the April meeting. She will be seeking guidance from the committee regarding how to present it to the full Council.

### **B. Criminal Procedure**

Committee chair Schultz reported that the workgroup (Schultz, St. John and Stephens) met on February 25 and March 11. They completed their review of all the criminal procedure code chapters received from the Legislative Reference Bureau (LRB). Attorney Southwick has already conveyed the workgroup's responses to approximately half of the questions and issues that were raised by the LRB and will submit the remainder of the workgroups responses shortly. There are a few outstanding provisions that the workgroup members still need to resolve, but they anticipate completing their responses to the LRB at their April 9<sup>th</sup> meeting.

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

Committee chair Leineweber reported that upon completion of the bias rule, the committee began to discuss the "other acts" rule. Guest speaker Assistant Attorney General Greg Weber attended the last meeting to provide a prosecutor's perspective on the rule. After lengthy debate, the committee tabled the discussion because members were unable to reach a consensus regarding a way to improve the current rule. At today's meeting they intend to move on to discuss business records, although they intend to return to their discussion on the "other acts" rule in the future.

## **V. Other Business**

### **A. PPAC Liaison's Report**

There was no PPAC report.

### **B. Assembly Judiciary Committee Report**

Council member Hebl reported that the small claims bill passed the Joint Finance Committee with a vote of 11 to 5. Also, the Governor signed the bill to allow police officers to electronically file criminal complaints with the District Attorney's office.

**C. Senate Judiciary Committee Report**

Council member Taylor submitted a written report highlighting SB 613, Uniform Collateral Consequences of Conviction Act, and SB 548, Sex Offender Residency Requirements, as well as reporting on the Chief Justice's Criminal Justice Mental Health Taskforce and the status of OWI court funding. Christopher Gibbs responded to questions regarding the report.

**D. Council Attorney's Report**

Attorney Southwick stated that she has been invited by the litigation section of the State Bar to speak at the upcoming State Bar Annual Convention in May. She will speak on the proposed changes to the discovery rules to incorporate the discovery of electronically stored information.

**VI. Adjournment**

Chair Hanan announced that the Evidence & Civil Procedure Committee and the Appellate Procedure Committee will meet at 11:30 a.m. The next Judicial Council meeting is April 16, 2010.

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