

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
April 17, 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, Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable George S. Curry, William C. Gleisner, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen R. Miller, Kathleen A. Pakes, Professor David E. Schultz, Honorable Mary K. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Honorable Patricia S. Curley, Allan M. Foeckler, Robert L. McCracken, Senator Lena Taylor, A. John Voelker.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Madu Enwemwa, Research and Policy Advisor for Senator Taylor; Kate Battiato, Office of Representative Hebl; Nancy Rottier, State Courts Legislative Liaison.

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

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

**II. Approval of March 20, 2009 Minutes**

The minutes were approved by consensus with no amendments.

**III. Appointment of a Nominating Committee**

Chair Stephens asked for volunteers to serve on the committee tasked with nominating candidates for the position of chair and vice chair, to be elected at the June meeting. She asked anyone interested in serving on the nominating committee, or anyone interested in the position of chair or vice-chair to notify her, Vice-Chair Hanan or Attorney Southwick prior to the May council meeting.

**IV. Discussion Regarding Institute for the Advancement of the American Legal System's Rules of Civil Procedure Pilot Projects**

Attorney Southwick distributed brochures received from the Institute for the Advancement of the American Legal System (IAALS). Council member Leineweber reported that the IAALS is a nonprofit organization based out of the University of Denver. He was recently contacted by executive director, Rebecca Kourlis, who served as a judge in Colorado for twenty years, including a justice on the Colorado Supreme Court. The IAALS provided Council member Leineweber with information regarding pilot projects in which that they would like various states to participate, including reform of civil procedure and discovery, judicial performance evaluation, judicial selection and others. He and Attorney Southwick participated

in a conference call with Ms. Kourlis to obtain some additional information on the projects involving civil justice reform. They discussed a move away from notice pleading to fact-based pleading, and modifying procedures and/or discovery rules specific to case type or amount in controversy. Council member Leineweber suggested that the Council obtain more information and discuss participating in a pilot project for civil justice reform. Attorney Southwick explained that this item is on the agenda for information only at this time. The IAALS will be sending additional information prior to the May meeting. Several council members inquired as to the source of the IAALS's funding. Their brochure states that funding comes from donations through the University of Denver. Council member Grenig stated that the IAALS conducted a study with the American College of Trial Lawyers, comprised of both plaintiff and defense attorneys. Council member Bradley suggested that the Council review the newly released article by Marc Galanter on civil justice in Wisconsin. Attorney Southwick was asked to distribute copies. Council member Wagner inquired about family law reform. Council member Leineweber stated that family law reform was not discussed, but suggested that she contact the organization directly or obtain information from their web site.

#### **V. Discussion and/or Action Regarding Proposed Electronic Discovery Rule Change Petition**

Council member Leineweber stated that the Evidence & Civil Procedure Committee approved the draft petition at their March 20, 2009 meeting, and it is now before the full Council for final approval prior to filing.

MOTION: Council member Christopher moved, seconded by Council member Weber, to approve the petition for filing with the supreme court.

Council member Hanan inquired as to whether input received from the groups who were asked to review the proposed amendments had been incorporated into the draft. Council member Leineweber stated that although the draft was distributed to potentially interested parties on two separate occasions, the committee received limited feedback. They did benefit from the diversity and experience of the committee members, including the ad hoc members, who aided in narrowing the focus of the amendments. Attorney Southwick added that a Judicial Council note referencing the use of referees was included as a result of a comment received. Professor Schultz asked for further explanation of the term "stipulated" in addition to "ordered" in Wis. Stat. § 804.09 (2). He questioned whether a stipulation would require court approval, and expressed concern regarding due process. Several members of the Evidence & Civil Procedure Committee stated that the intent is to encourage parties to resolve their differences without court intervention, although they agreed that to the extent a stipulation altered a scheduling order or other directive of the court, an order would be required. The civil practitioners expressed no concern that this provision would impede due process and generally supported the use of stipulations.

Chair Stephens called for a vote on the motion. It was approved unanimously with Council member Bradley abstaining.

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

Chair Stephens suggested that the full Council undertake the review of the rules of evidence. Council member Leineweber agreed that the project was appropriate for the full Council, and offered assistance from the Evidence & Civil Procedure Committee. He stated that the committee has already begun discussing Professor Blinka's suggestions, and has prepared a preliminary work plan. He added that the committee proposed reviewing Federal Rule 502 issues and spoliation, in addition to those areas raised by Professor Blinka. Vice Chair Hanan suggested that this project could benefit from the vast array of experience of the full Council. Chair Stephens asked the Evidence & Civil Procedure Committee to recommend the evidentiary rules that should be included in the review, and propose a work plan.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Chair Stephens reported that the Appellate Procedure Committee met in March, and completed their review and discussion of the comments received regarding the presentence investigation report proposal. The drafting workgroup (consisting of Greg Weber, Peg Carlson, Meredith Ross and Chair Stephens) will begin preparing the final redraft. They will meet in the Court of Appeals library following the full Council meeting.

The Assembly and Senate Judiciary Committees held a joint hearing on April 14, regarding the three companion appellate procedure bills introduced and co-sponsored by Senator Taylor and Representative Hebl (2009 AB 122-24 and SB 98-100). Senator Taylor and Chair Stephens testified in support of the bills. The Department of Justice, the State Bar, the Court of Appeals, and the Director of State Courts all registered in support of the bills. No parties registered in opposition.

### **B. Criminal Procedure**

Committee chair Schultz reported that the Legislative Reference Bureau (LRB) is still in the final editing stage of the last few remaining chapters. He added that the questions received from the LRB to date are generally relatively minor and easily answered.

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

Committee chair Leineweber reported that the committee will meet following the full Council meeting to begin preparing the work plan for the review of the rules of evidence.

The committee is also simultaneously moving forward on the small claims issue brought to the Council by Chief Justice Abrahamson. Representative Hebl stated that he has been considering an amendment to the small claims statutes to increase the amount in controversy from \$5,000 to \$10,000. Council members expressed mixed opinions. Opponents raised concern that it would cause increased demand on the already over-burdened court staff handling the small claims cases. Small claims cases have a lower filing fee, so it would also impact the

court's budget. They also pointed out that a \$5,000-10,000 claim is significant enough that it should not be brought in small claims court where the rules of evidence are not applicable, adversely impacting the record on appeal. Proponents favored expanding the number of cases covered by the simplified small claims procedures, due to the ever-increasing number of pro se litigants. They also suggested that because it can cost more than \$5,000-10,000 to retain an attorney, many of these claims are never filed in circuit court. Nancy Rottier added that this issue has come before the legislature several times and the chief judges have historically opposed it.

## **VIII. Other Business**

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

Council member Leineweber reported that he gave a presentation regarding video conferencing. He suggested that over the next year, the Council may wish to study the impact that the rule, subchapter III of Wis. Stat. chapter 885, and the introduction of technology has had on the courts and litigants.

### **B. Council Attorney's Report**

Attorney Southwick reported that on April 3, she and Chair Stephens attended a public hearing before the Joint Finance Committee on the 2009-11 Budget Bill. She provided both written and oral comments to the committee. On April 21, she will attend the executive session of the Joint Finance Committee, when the Judicial Council's budget is scheduled for discussion. She will be present to provide additional information, if needed, although questions are generally directed to the Legislative Fiscal Bureau or the Executive budget staff.

## **IX. Adjournment**

Council member Bradley announced that she is on the nominating committee for the Judge of the Year and Lifetime Jurist Achievement awards. She asked any member with suggestions for increasing nominations or comments on the nomination process to please contact her.

The Council adjourned by consensus at 11:00 a.m.