

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
April 21, 2017

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Sarah Walkenhorst Barber, Honorable Michael R. Fitzpatrick, Honorable Eugene A. Gasiorkiewicz, William C. Gleisner, Christian A. Gossett, R. Duane Harlow, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright.

MEMBERS EXCUSED: Sherry D. Coley, Devon M. Lee, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Anthony LoCoco, Law Clerk to Justice Annette K. Ziegler; Liam Gossett.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:40 a.m. Attorney Southwick circulated the roll call sheet.

II. Approval of March 17, 2017 Minutes

MOTION: Council member Myers moved, seconded by Council member Gleisner, to approve the March 17, 2017 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Potential New Projects:

A. Wis. Stat. § 806.02, Default Judgment

Prior to the meeting, Attorney Southwick circulated a memorandum dated April 11, 2017, explaining a potential project that was suggested by a Wisconsin attorney who feels that defendants filing cross-claims and counterclaims should have the right to file motions for default. It should not be available exclusively for plaintiffs. The memo provided a summary of relevant case law and a copy of Wis. Stats. §§ 806.02 and 802.07. Attorney Southwick explained that the Evidence & Civil Procedure Committee considered the issue and agreed that it should be accepted as a project for further study.

MOTION: Vice Chair Blanchard moved, seconded by Council member Stertz, to accept the project for study. Motion approved unanimously. Council member Myers moved, seconded by Council member Gleisner to refer the project to the Evidence & Civil Procedure Committee to conduct a study and provide a recommendation to the Council. Motion approved unanimously.

B. Uniform Unsworn Domestic Declarations Act

Prior to the meeting, Attorney Southwick circulated a memorandum dated April 14, 2017, along with a copy of the Uniform Unsworn Domestic Declarations Act (UUDDA) and Wis. Stat. § 887.015. Attorney Southwick explained that the Wisconsin Uniform Law Commission has asked for a recommendation on whether the UUDDA should be adopted in Wisconsin. She noted that Wisconsin has already adopted the uniform law regarding foreign declarations. The UUDDA would extend that law to domestic declarations. She noted that the act applicable to foreign declarations was passed by the Legislature. She suggested that if the Council recommends adoption of the UUDDA, it might want to introduce it as a bill.

Council member Shriner spoke in support of studying the UUDDA, but observed that the Federal Rules of Civil Procedure have a similar provision that is much shorter. The federal counter-part is a very simple, useful rule. He spoke in support of adopting a similar rule in Wisconsin, although he expressed doubt that the rule needs to be as long and complicated as the UUDDA. He also questioned whether Wisconsin has the authority to impose criminal penalties for perjury, as stated in the uniform laws.

The Council discussed whether the uniform law only applies to litigation or whether declarations can be used in other matters. Council member Fitzpatrick also questioned how the UUDDA would impact other rules that require an affidavit. Council member Shriner agreed that there are several issues to consider, but he favored recommending a rule to fill the gap in current law.

Attorney Southwick noted that there is another uniform act that also should be studied if the Council accepts this project. The other act applies to both foreign and domestic declarations. It is recommended for states that have adopted neither act, but the Council may want to recommend repeal and replacement of the current provision applicable to foreign declarations.

MOTION: Council member Shriner moved, seconded by Council member Gasiorkiewicz, to accept the project and refer it to the Evidence & Civil Procedure Committee to conduct a study and make a recommendation. Motion approved unanimously. Council member Shriner suggested that the Criminal Procedure Committee should be consulted for both the use of declarations in criminal cases, as well as the penalty provision in the act.

C. Uniform Collaborative Law Act

Prior to the meeting, Attorney Southwick circulated a memorandum dated April 14, 2017, along with a copy of the Uniform Collaborative Law Act (UCLA) and an “FAQ” from the Uniform Law Commission. Attorney Southwick explained that the Wisconsin Uniform Law Commission has asked for a recommendation on whether this uniform law should be adopted in Wisconsin. She noted that this act is a bit older and has been adopted in a number of states, as listed in the memo.

Council member Gleisner inquired whether the Council currently has any members who specialize in family law. Attorney Southwick responded in the negative. She noted that while collaborative law is used most frequently in family law cases, its use is expanding to other civil matters. Attorney Southwick indicated that if the Council votes to accept this as a study project, she will recruit one or two attorneys who have specialized knowledge in this area to serve as ad hoc committee members to assist with the project.

Council member Shriner noted that the UCLA is primarily focused on the lawyers who do collaborative law. It provides guidelines for what they can do and how they should do it. He suggested that because it appears to focus on legal ethics and professional responsibility, perhaps the State Bar would be a more appropriate body to issue a recommendation. Attorney Southwick agreed, and suggested that for this project the Council may not be the appropriate body to recommend the specific text of the rule. However, the Council could be one of the groups to comment on whether a rule such as the UCLA should be adopted. She added that the State Bar Family Law Section has been asked to make a recommendation on the adoption of the UCLA. She will contact the staff liaison to that Section to inquire on the status of the project.

Council member Fitzpatrick explained generally how the collaborative divorce process works. He also noted that the Wisconsin Supreme Court has not given any indication of its approval or support for the process.

Council member Gasiorkiewicz suggested that a potential benefit to adoption of the UCLA could be addressing challenges from state to state. Parties involved in these proceedings should be protected from collateral attacks from out of state.

Council member Gleisner stated that former Council member Catherine La Fleur is a very respected family law attorney with considerable experience in the area of collaborative law. He suggested that the Council could consult her on this issue. Council member Pliskie suggested consulting Attorney La Fleur in both her capacity as an attorney knowledgeable in the area of collaborative law and as a former Judicial Council member, to obtain her opinion on whether the Judicial Council is an appropriate body to offer a recommendation on the UCLA.

Attorney Southwick advised the Council that if members do not feel they have sufficient expertise or the ability to obtain the expertise to conduct a study on this topic, they can decline the project. Members generally agreed that the appointment of knowledgeable ad hoc members would be necessary for the success of a study.

Council member Gleisner suggested that the Collaborative Family Council of Wisconsin, of which Attorney La Fleur is a member, should be consulted regarding whether the Judicial Council should study the UCLA. Council member Fitzpatrick inquired as to which organization could be consulted for an opposing viewpoint to maintain balance. Council member Pliskie suggested that the Judicial Council should decline this project. He felt that the State Bar's Family Law Section is a more appropriate body to issue a recommendation. Several members agreed and expressed reservations about undertaking this project because the Council does not have any current members with experience in this area.

MOTION: Council member Pliskie moved, seconded by Council member Stertz, to deny the project. After further discussion, members agreed by consensus to table the motion. Attorney Southwick will contact Attorney La Fleur to inquire whether she feels the Judicial Council is an appropriate body to study this issue. Attorney Southwick will also contact the Family Law Section to inquire as to whether its members would like the Council's assistance in studying this issue. The Council will continue its discussion at the next meeting.

IV. Discussion and/or Action Regarding Judicial Council's 2017-2019 Budget

Attorney Southwick reported that she attended the court's agency budget briefing on March 28, 2017. Chief Justice Roggensack spoke on behalf of the court, including the Judicial Council. The Chief Justice stated that both the Judicial Council and the Judicial Commission are working well and no statutory changes should be made with regard to either agency.

Council member Moran reported that the court is working with a member of the Joint Finance Committee to draft language for a motion consistent with the Chief Justice's recommendation. Council members Ott and Wanggaard offered to assist with drafting language for the motion and seeking support for it, as well as funding for the Council.

V. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the Appellate Procedure Committee continues to work on a rule regarding substitution and withdrawal of counsel at the appellate level. The committee is also assisting Attorney Southwick with drafting a memorandum in support of the petition regarding size and number of appellate briefs in multiparty cases. The petition was previously approved by the Council.

Council member Van De Hey also noted that the committee is working to build support for introducing the Judicial Council's draft bill to reorganize the rules regarding prisoner challenges to agency decisions. Council member Van De Hey explained that the current process is very confusing. He added that it is so confusing that many inmates have stopped trying to use it. Instead, inmates often file John Doe petitions to bypass the prisoner litigation process. While he agreed that prisoners often abuse the system, he also pointed out that prisoners are some of the most vulnerable in the justice system and they need access to the courts. The draft bill reorganizes prisoner litigation rules that are scattered throughout the statutes and places them in one subchapter where they would be much easier to find, understand, and follow.

Council member Myers inquired as to which groups might support the bill. Attorney Southwick responded that she has been talking with judges and court staff attorneys in some of the counties where a high number of these cases are filed, including Dane and Grant Counties. She has also sought support from the University of Wisconsin Law School's Remington Center. Milwaukee County handles a large number of these cases, so she will be contacting corporate counsel to discuss possible support. Council member Gossett suggested that Dodge County might also be interested in this issue. Vice Chair Blanchard inquired as to the Department of

Justice's position. Council member Harlow indicated that DOJ has decided not to support the bill because DOJ feels the process is already established by law and codifying it is not in the best interests of DOJ.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee continues to study the discovery process in criminal cases. The committee continues to draft a model checklist for use by law enforcement to ensure that all information is transmitted to the prosecutor. The committee is focusing on keeping the checklist simple and easy to use by limiting it to a list of the categories of information that must be produced.

Attorney Southwick explained that the study the committee has undertaken has really altered the direction of its work. Initially, members probably expected that the surveys would produce many complaints by defense attorneys who feel that prosecutors are not producing sufficient information in a timely manner. While the committee received some of those complaints, a considerable number of complaints came from prosecutors indicating that law enforcement is not providing them with all the information in a timely manner.

The committee may have initially expected that the project would involve drafting statutory amendments to address production by prosecutors. Instead, it appears that the problem has a much deeper root, so the committee determined that it would be best to begin addressing the issue by creating a checklist and drafting some "best practice" recommendations for law enforcement. It is also working with DOJ to identify areas where additional training might be helpful. It appears that if there is more complete production by law enforcement, the information will be more likely to be produced to the defendant in a timely manner.

C. Evidence and Civil Procedure

Attorney Southwick reported that petition 17-03, class actions, was discussed by the supreme court at its administrative conference the previous day. The court voted to seek comments on the petition and set it for a public hearing. Some justices appeared to want more information, so the court commissioner will talk with the justices and draft a letter to the Judicial Council to relay their questions.

With regard to 16-02, rules of evidence, Attorney Southwick has filed the amended petition and supplemental memorandum. Attorney Southwick does not know whether the court will resume its discussion of the petition at an administrative conference or whether the court will schedule another public hearing on the petition.

Committee chair Shriner reported that the committee continues to study the 2015 amendment to Rule 37 of the Federal Rules of Civil Procedure regarding failure to preserve electronically stored evidence. Wisconsin's current rule is based on the previous version of the federal rule. The previous version resulted in many problems at the federal level due to inconsistent application of the rule and the imposition of huge sanctions. The threat of huge sanctions has resulted in over-preservation of information, which increases the cost of litigation.

While problems such as those occurring at the federal level have not been reported in Wisconsin, the committee is considering whether Wisconsin's rule (s. 804.12) should be amended to reflect the federal changes.

VI. Other Business

A. PPAC Liaison's Report

There was no PAC report.

B. Council Attorney's Report

Attorney Southwick reported that she is working with Council member Ott regarding introduction of the Council's bill to repeal a generally unused and confusing statute regarding privileges for deans of students and school psychologists (Wis. Stat. § 885.205).

At a previous meeting, Council member Pliskie suggested that the Council form a committee to increase awareness and knowledge about the Council among members of groups such as the Legislature. If the Council would like to have a broader discussion of that suggestion, she offered to put it on a future agenda for further consideration. The Council's legislative members felt that Council members need to be talking with their legislators right now to convey that information while the budget is being discussed. Council member Ott suggested asking former Council members to contact the Joint Finance Committee in support of the Judicial Council.

Council member Wanggaard discussed ways to convey to the Legislature that the Judicial Council saves the state money. Council member Moran noted that many Judicial Council projects would each cost the state three times the Council's annual budget if those projects were done by other groups. He also noted that many Judicial Council projects simply would not be done without the Council, so there would be a significant lost opportunity cost. The procedural rules would become increasingly outdated, reducing court efficiency and driving up the cost of litigation.

VII. Adjournment

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