

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
May 21, 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, Thomas W. Bertz, Michael R. Christopher, Allan M. Foeckler, Professor Jay Grenig, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Professor David E. Schultz, Rebecca St. John, Honorable Mary K. Wagner.

MEMBERS EXCUSED: James C. Boll, Honorable Ann Walsh Bradley, Honorable Patricia S. Curley, Representative Gary Hebl, Senator Lena Taylor, A. John Voelker, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Ross Voelker

I. Call to Order and Roll Call

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

II. Approval of April 16, 2010 Minutes

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

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

At an open administrative conference on April 28, 2010, the supreme court voted to adopt the Judicial Council's amended petition (no. 09-01) to create and amend statutes relating to the discovery of electronically stored information, effective January 1, 2011. The Council's amended petition provided for a discretionary discovery conference. At the administrative conference, the court amended the provision to require that the parties confer in all cases involving discovery of electronically stored information. Council member Leineweber explained that the court has invited the Judicial Council to propose specific language for the amendment, and would like to select the amended language by June 30, 2010. He stated that this item is also on the Evidence & Civil Procedure Committee's agenda for today and suggested that the Committee could discuss it further and bring a proposal back to the full Council at the June meeting.

Attorney Southwick added that at the court's open administrative conference, several members of the court favored amendments that move still closer to the federal rules, including mandatory initial disclosures and mandatory discovery conferences. The court ultimately only made discovery conferences mandatory in cases involving discovery of electronically stored

information, and instructed court staff to draft the proposed final language. Prior to the meeting, Attorney Southwick distributed some proposed language received from court staff. She explained that the court has asked for several drafting options to consider and has invited the Council to provide comments.

Council member Leineweber also reminded the Council that both the Evidence & Civil Procedure Committee and the full Judicial Council have previously discussed and rejected mandatory discovery conferences. He explained that the vast majority of state court cases do not involve contentious electronic discovery issues. Attorney Southwick added that the court expressed concern that the discretionary rule proposed by the Council would not ensure that the parties conferred prior to serving electronic discovery requests. However, the proposed mandatory conference does not contain a requirement that it be conducted prior to service of discovery, so it really does not address the issue identified by the court. Council member Grenig stated that since most information is now generated electronically, the mandatory conference could be construed to encompass almost all discovery in every case.

Attorney Southwick also explained that the court is going to seek additional written comments over the summer and will schedule another public hearing in the fall prior to the rules going into effect, so there will be another opportunity for the Council to comment on the rules, including the proposed amendment. Chair Hanan asked the Evidence & Civil Procedure Committee to discuss the provision regarding mandatory discovery conferences and make a recommendation to the full Council at the June 18th meeting.

IV. Committee Reports

A. Appellate Procedure

Committee chair Stephens reported that the Appellate Procedure Committee met on April 16 and continued to work on a memo to the Council regarding the presentence investigation report project. At today's meeting, committee members will review and discuss a revised version of the draft memo.

The committee will begin to work on the project regarding ghostwriting of legal documents in September. Ann Zimmerman, Tim Pierce, and Marsha Mansfield have been invited to join the committee as ad hoc members to work on the ghostwriting project.

Council member Schultz referenced a recent New York ethics opinion on the issue of ghost writing of legal documents. He will provide a copy of the opinion to Attorney Southwick and she will circulate it to all council members.

B. Criminal Procedure

Committee chair Schultz reported that the committee is awaiting final drafts from the Legislative Reference Bureau (LRB) regarding proposed amendments to the rules of criminal procedure.

C. Evidence and Civil Procedure

Committee chair Leineweber reported that the committee met on April 16 to continue its review of the rules of evidence. Committee members continued to discuss the “other acts” rule, Wis. Stat. § 904.04, a provision to allow authentication of business records, and the rule regarding character for truthfulness, Wis. Stat. § 906.08. Marquette Professor Daniel Blinka will participate in the committee’s meeting later today to share his thoughts on possible amendments to these three rules.

D. Nominating Committee

Vice-Chair Stephens reported on behalf of the nominating committee, consisting of Vice-Chair Stephens, and Council members Grenig and Taylor. The committee unanimously nominated Chair Hanan to continue to serve as chair and Council member Schultz to serve as vice-chair of the Council for the 2010-2011 Council year.

V. Other Business

A. PPAC Liaison’s Report

There was no PPAC Report.

B. Assembly Judiciary Committee Report

There was no Assembly Judiciary Committee Report.

C. Senate Judiciary Committee Report

There was no Senate Judiciary Committee Report. Chair Hanan announced that the municipal court bill was signed by the Governor.

D. Council Attorney’s Report

Attorney Southwick reported that the supreme court public hearing on the Council’s rule change petition regarding communications in mediation (no. 09-12) was held on April 27, and the court adopted the petition at its open administrative conference later that day.

Attorney Southwick announced that Council member Bradley received the Marygold Melli award from the Legal Association for Women. The award recognized her substantial contributions to the interests of women in the law.

Attorney Southwick announced that the Judicial Council is taking an active role in educating the Bar on the new rules for discovery of electronically stored information. She spoke at the State Bar Annual Convention regarding the newly adopted rules. A panel consisting of Attorney Southwick, Council members Leineweber and Grenig, and Committee members

Gleisner and Sankovitz will conduct a continuing legal education webcast regarding the new discovery rules on June 9, 2010.

Attorney Southwick reminded council members that the end of the fiscal year is approaching so all outstanding travel vouchers must be submitted for payment.

VI. Adjournment

Chair Hanan recognized Vice-Chair Marla Stephens who recently completed ten years of service as chair of the Judicial Council. Chair Hanan, Council member Schultz, Council member Leineweber and Assistant Attorney General Mary Burke spoke regarding Vice Chair Stephens outstanding tenure, leadership and accomplishments during her years serving as chair. Vice-Chair Stephens was also presented with a letter of appreciation from Chief Justice Abrahamson and a plaque commemorating her service.

The Council adjourned by consensus at 10:30 a.m.