

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
May 20, 2016

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, William C. Gleisner, Devon M. Lee, J. Denis Moran, Dennis Myers, Benjamin J. Pliskie, Representative Jim Ott, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Amy E. Wochos, Greg M. Weber, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Christian A. Gossett, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Honorable Jeffrey A. Wagner.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Marisa Janssen, Winnebago County District Attorney's office; Mark Wadium, Outagamie County Lobbyist.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m.

II. Approval of April 15, 2016 Minutes

MOTION: Council member Myers moved, seconded by Council member Wochos, to approve the April 15, 2016 meeting minutes as presented. Motion approved with Council member Ziegler abstaining.

III. Appointment of a Nominating Committee

Each year, the Council tasks a nominating committee with selecting candidates to serve as chair and vice chair for the upcoming Council year. The nominating committee will announce its recommendation at the June Council meeting. The committee generally consists of three members. Chair Bertz asked for volunteers to serve on the committee.

ACTION: Council members Gleisner, Lee, and Myers volunteered to serve on the committee. Council member Gleisner was selected as committee chair.

Attorney Southwick asked Council members to contact a member of the nominating committee if anyone is interested in serving as chair or vice chair of the Council during the 2016-2017 year.

IV. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence, Supreme Court Petition 16-01 and 16-02

Attorney Southwick reported that the supreme court discussed the two petitions at an administrative conference on May 12, 2016, and voted unanimously to set them for public hearing. The supreme court was very complimentary of the work of the Council. Court staff indicated that the court will probably schedule the hearing in September 2016.

Attorney Southwick reported that she received suggestions for some minor edits to the proposed amendments from a drafting attorney at the Legislative Reference Bureau (LRB). She noted that she circulated the petitions to the LRB for comment prior to filing them and no changes to the proposed text of the rules were suggested at that time. She has placed this issue on the Evidence & Civil Procedure Committee's agenda for discussion and a recommendation.

V. Discussion and/or Action Regarding Wis. Stat. § 885.03, Service of Subpoena

At the previous meeting, the Judicial Council voted to undertake a study of Wis. Stat. § 885.03 and issue a recommendation regarding whether it should be amended. When the Evidence & Civil Procedure Committee previously reviewed s. 885.03, members expressed concern that leaving a subpoena at the witness's abode is insufficient to satisfy constitutional due process requirements.

Prior to the meeting, Attorney Southwick distributed a chart listing the service provisions from other states for comparison to s. 885.03. She noted that Wisconsin is definitely in the minority by permitting a subpoena to simply be left at the home of witness. In the absence of personal service, most other state statutes require that a subpoena must be left with a person of suitable age or relationship to the witness. Chair Bertz asked the judicial members whether they have knowledge of any problems that have arisen by the practice of leaving a subpoena at the abode of a witness, and whether sufficiency of service has been challenged as a result. The judicial members present at the meeting did not indicate any problems.

Council member Fitzpatrick indicated that problems can arise under other provisions, including service of summons. He recounted an experience where service was challenged because the recipient of the summons misrepresented that she was a resident of the home where the party resided. Council member Van De Hey suggested judges do not see problems arise under s. 885.03 because attorneys do not rely on simply leaving a subpoena at the abode, but instead use personal service to insure that the witness appears.

Council member Ziegler suggested that the Council should obtain information from practicing attorneys to determine whether they rely on the current statute and whether it has caused problems. Several attorney members indicated that they do not rely on leaving a subpoena at the abode of a witness. Council member Wanggaard stated that in his experience in law enforcement, officers personally served subpoenas, and did not rely on simply leaving it at a person's home. He noted that with modern technology, it is much easier to locate witnesses to effect personal service. Attorney Southwick suggested that the Council might want to consider whether the rule should be amended to more accurately reflect actual practice.

Attorney Southwick noted that the Council also previously discussed whether the rule could be amended to reflect the use of modern technology. For example, Texas now permits service by email with proof that it was received by the intended person. A bill was introduced that would permit service via Facebook, but it has not passed. Utah has permitted service via Facebook on a case-by-case basis.

Attorney Southwick recalled that the Council's district attorney representative also inquired about adding a provision to address witnesses who voluntarily agree to cooperate, but then fail to appear. She reported that at least one other state has adopted a provision allowing courts to find a "voluntary" witness in contempt for failure to appear even though they were not served because the witness waived service.

Council member Pliskie suggested that the Council should study why the statute permits service of subpoenas and evictions by leaving it at the abode, but does not permit that form of service for any other matter. He also suggested that the Council study standardizing methods of service.

Council member Wochos expressed her continued concern with service by publication. Attorney Southwick reported that a Legislative Council study committee has been appointed to study publication of government and legal notices. The committee is expected to conduct its study over the summer and will likely issue a recommendation in the fall.

Council member Fitzpatrick suggested reaching out to the litigation and criminal law sections of the State Bar to inquire whether attorneys have experienced any practical problems with s. 885.03, and whether they actually rely on the process of simply leaving a subpoena at the home of a witness. Council member Wanggaard suggested inquiring whether they have any suggested alternatives for service. Members agreed with the suggestion by consensus, so Attorney Southwick will send an inquiry to those two sections of the State Bar.

Council member Moran suggested deferring any further action until Council member Shriner is present. The committee will resume discussing the issue at its next meeting.

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

Prior to the meeting, Attorney Southwick circulated a copy of the Judicial Council's 2015-2017 budget request. She noted that for the past several budget cycles, she has prepared a budget development issue paper seeking restoration of the Council's full funding from general purpose revenue (GPR). (An example can be found on pages 29-32 of the Council's 2015-2017 budget request.) Each budget cycle, the Council has faced dwindling funding with the source of its funding increasingly shifted from GPR to program revenue from the Director of State Courts office. She explained that the Council's entire budget now comes from program revenue transferred from the Director of State Courts office. Council member Moran stated that there needs to be a change in the way the Council is funded, and noted that he has discussed some options with Attorney Southwick.

The Council began discussing how to approach its 2017-2019 budget request. Council member Ziegler recalled that the Legislature considered elimination of the Council during the previous budget, but ultimately recognized that the Council should continue to operate. She expressed her opinion that the Council should receive funding because it does valuable work.

Council member Wanggaard suggested that more legislators need to be educated on the work of the Council. He suggested that if more legislators understood all that the Council does, they would realize how important it is and would support funding it. He urged Council members to educate their colleagues and others on the Judicial Council and its work. He also noted that the work done by the Council improves efficiency, reduces litigation costs, and reduces the number of appeals, which can result in huge monetary savings for the State and its citizens. He recognized that it is very difficult to assign a monetary value to it, but felt certain that the value far exceeds the cost of the Council's continued operation. Council member Moran added that the value of the professional time donated by Council and committee members far exceeds the Council's annual budget.

The Council discussed whether changing its name would help other branches understand its purpose. Council member Ott suggested that the Council keep "judicial" in its name, but perhaps add to it to differentiate it from other groups that have "judicial" in the name. Council member Pliskie suggested "Wisconsin Procedural Law Council." He also suggested that a proposal such as a name change should be the result of a long-term study, and not part of the budget process. Attorney Southwick stated that the statutes contain hundreds of explanatory "Judicial Council Notes." She questioned how a name change would affect the Council's ability to take credit for decades of its work memorialized in those Notes.

Council members discussed the time line for approving and submitting the budget request. Attorney Southwick stated that the Council has previously approved a tentative budget request at its June meeting, and then authorized the Council's Executive Committee to work with Attorney Southwick to prepare and approve the final request. The statutory deadline to submit budget requests is usually prior to the Council's September meeting, so the full Council approves the submission retroactively at the September meeting.¹

Council members Ott and Wanggaard suggested that the Council send correspondence to legislative leaders explaining the Council's work, and the value or the savings that results from the Council's work. Attorney Southwick stated that during the previous budget cycle, she drafted a memo describing the Council and listing its accomplishments. She provided a copy to each member of the Joint Finance Committee. Council member Wanggaard suggested that Attorney Southwick update that document with the Council's recent accomplishments.

Council member Gleisner suggested that the Council appoint a committee to study the budget over the summer and report back to the full Council in September. Council member Moran suggested that a study is probably unnecessary because there is relatively little discretion

¹ Wis. Stat. § 16.42 (1) requires, "All agencies, other than the legislature and the courts, no later than September 15 of each even-numbered year" to submit a budget request to the Department of Administration.

involved in preparing the budget request. The real issue is how to deliver a message to the Legislature, and specifically, the Joint Finance Committee. Council member Ziegler agreed that it is important to update the document detailing the Council's work and its accomplishments, but she felt that the challenge is in getting the information to the right people who will read and understand it. Council member Wanggaard agreed, and suggested that it is important for legislators' staff members to understand the importance of the Council.

Council member Weber noted that the National Center for State Courts (NCSC) studied the Judicial Council in 2007 and prepared a report and recommendations. He suggested that members review that report. Attorney Southwick stated that there is a link to it on the Judicial Council's website.

Council member Myers suggested adding the Judicial Council's budget to the Director of State Courts' budget. Council member Moran agreed that it might be better than the current funding stream for the Council, but expressed some concerns. The Council is an independent agency so the Legislature should fund it from general purpose revenue. However, he recognized the practical problems associated with an agency with only one staff member, and the fact that many legislators do not know the difference between the Judicial Council and the Judicial Commission. He suggested that it might be in the Council's best interests to be compared with the Legislative Council instead of the Judicial Commission. For example, he suggested educating legislators that while the Legislative Council works to develop substantive law, the Judicial Council works to develop procedural law.

Council member Gleisner suggested that if the Judicial Council was an agency within the court system, the court might have more success in obtaining funding for it than the Council is able to secure on its own. Attorney Southwick noted that during the previous budget cycle, the executive budget attempted to reduce the total number of state agencies. Several agencies were recommended for elimination or consolidation with other agencies. She does not know whether to anticipate another attempt to eliminate the Judicial Council if the Council seeks to retain its independence.

Council member Ott suggested that the Council should consider which alternative will be more difficult: (1) Convincing stakeholders that the Judicial Council can maintain its independence as an agency under the court; or (2) Convincing stakeholders that the Judicial Council and the Judicial Commission are two separate entities with different duties, and that the Council is truly independent of the Judicial Commission and the court. In his opinion, it will be easier to convince stakeholders that the Council can maintain its independence as part of the state court if it only receives administrative support from the court.

Council member Moran will work with Attorney Southwick to prepare a budget proposal for the Council to review at its next meeting. Council member Wanggaard suggested that Attorney Southwick update the document regarding the Council's accomplishments so that he and Council member Ott can begin educating their colleagues. Council member Barber felt that the Council should educate the Legislative Fiscal Bureau, as well. She suggested providing them with a copy of the overview document describing the Council and listing its accomplishments.

The Council will resume its discussion at the next meeting.

VII. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the committee has circulated proposed amendments regarding the record on appeal and the size and number of briefs in multiparty cases, and has requested feedback from potentially interested parties. Comments are due by June 10, 2016. The committee will begin discussing them at its June 24, 2016 meeting.

At today's meeting, the committee will continue discussing withdrawal or substitution of counsel at the appellate level. The committee previously studied rules from other states, and is ready to begin reviewing a draft rule. The committee will be revisiting s. 809.62, conditions of grant of review, in light of a new supreme court case. The committee is also studying the issue of trials in bifurcated cases when one issue is still on appeal. The committee previously sought feedback from the State Bar litigation section board. Members will begin reviewing the board's response.

B. Criminal Procedure

Committee chair Blanchard reported that the committee met and continues to discuss whether possible amendments to the criminal procedure discovery rules should be studied, and whether proposed amendments should be recommended through legislation or a supreme court rule change petition. Attorney General Schimel joined the committee's discussion to provide his views. The committee has agreed to survey potentially interested stakeholders to inquiry whether they have experienced problems or have concerns or suggestions regarding the current discovery statute.

C. Evidence and Civil Procedure

Attorney Southwick reported that the committee did not meet in April, but the committee continues to work on a proposed amendment to the class action statute based on the federal model. Members will resume their work at a committee meeting following the Council meeting.

VIII. Other Business

A. PPAC Liaison's Report

Council member Moran reported that PPAC will begin working on the court's budget request at its June meeting.

B. Council Attorney's Report

Attorney Southwick reported that she is still receiving complaints from vendors whose payments are past due because of the new STAR system. However, the Department of Administration has indicated that all past due travel vouchers have been paid. She asked members to contact her if they have not received any reimbursements that they are owed.

IX. Adjournment

The Council adjourned by consensus at approximately 10:45 a.m.