

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 16, 2009

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

MEMBERS PRESENT: Chair Marla J. Stephens, Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable George S. Curry, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Robert L. McCracken, Stephen R. Miller, Kathleen A. Pakes, Professor David E. Schultz, Senator Lena Taylor, A. John Voelker, Honorable Mary K. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Vice-Chair Beth E. Hanan, Honorable Patricia S. Curley, Allan M. Foeckler, William C. Gleisner.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Honorable Richard Sankovitz; Eric Peterson, Legislative Director for Senator Taylor; Nancy Rottier, State Courts Legislative Liaison; Kate Battiato, Office of Representative Hebl.

I. Call to Order and Roll Call

Chair Stephens called the meeting to order at 9:45 a.m. All members introduced themselves.

II. Approval of November 21, 2008 Minutes

The minutes were approved by consensus with no amendments.

Chair Stephens addressed the agenda items out of order.

III. Discussion and/or Action Regarding Request to Review Rule 814.29, Security for Costs, Service and Fees for Indigents

At the last meeting, Attorney Southwick distributed the written results of a survey conducted by court staff. The survey results do not reflect the experience of the State Public Defender's office, because individuals represented by public defenders are generally not required to submit an affidavit. Council member Voelker indicated that he would follow up with court staff at the clerk of courts' institute in February and address that point. Further discussion regarding this item was postponed pending receipt of additional information.

IV. Discussion of Proposed Electronic Discovery Rules

Council member Leineweber explained that the Evidence & Civil Procedure committee has worked through several drafts of the proposed electronic discovery rules to arrive at the one that is presently before the Council upon the committee's recommendation. Judge Sankovitz, *ad hoc* member of the Evidence & Civil Procedure committee, led a discussion regarding the

proposed rules. He explained that the committee is not really presenting any new concepts, but have simply taken the existing discovery rules and crafted them to apply to the discovery of electronically stored information. Additionally, while the proposed rules are modeled after the federal rules, they have been simplified to fit the needs of Wisconsin courts and litigants. For example, the proposed state rules do not include the federal claw-back agreement provisions, which provide for the return of confidential information inadvertently disclosed. The proposed rules contain four basic provisions: 1) a definition of electronic discovery; 2) a protocol for conducting electronic discovery; 3) limitations on how far parties need to go to obtain information (i.e. what is “reasonably accessible”); and 4) a safe harbor rule to protect parties who destroy information during the good faith operation of their computers. Council member Grenig added that electronically stored information includes more than just information stored on a computer. It can also extend to other electronic devices such as cell phones, personal digital assistants (“PDA’s”) and black boxes from automobiles.

The intent of the proposed rules is to provide guidelines to manage the electronic discovery process, including costs, which are often a key issue in electronic discovery disputes. The committee considered the fact that the current state rules already require information to be produced in the format in which it is kept in the normal course of business, and allow for protective orders to prevent undue burden. Therefore, they opted not to include special rules for electronic discovery, and instead rely on the rules generally applicable to all discovery. The committee representatives also noted that the proposed rules only require electronic information to be produced in one requested format, not in multiple formats.

Council member Bradley inquired about the general lack of definitions in the proposed rules. Judge Sankovitz explained that some definitions can be found in the notes; however, many of the terms are self-defining. Council member Grenig added that neither the federal rules nor the uniform rules contain a definition section. Definitions were purposely not included in the proposed state rules because technology changes rapidly and definitions quickly become outdated. Judge White expressed concern for pro se litigants. Judge Sankovitz explained that the committee attempted to keep the rules simple and used similar language to that already found in the discovery rules to avoid added confusion. Chair Stephens inquired as to applicability in quasi-civil cases. The proposed rules treat electronically stored information like paper documents under the rules. The committee believes the proposed rules are appropriate for the lower dollar amounts in controversy in most state court litigation.

MOTION: Council member Leineweber moved, seconded by Council member La Fleur, to have the proposed e-discovery rules developed in a rule making petition that can be brought before the supreme court. Motion approved with Council member Bradley abstaining.

Chair Stephens inquired as to how the committee wished to proceed. Council member Leineweber suggested that once the petition is drafted, this item will be placed back on the Council’s agenda for final approval.

V. Discussion and/or Action Regarding Legislative Fiscal Bureau Request Regarding Sentencing Guidelines

Attorney Southwick explained that she was contacted by Paul Onsager, Legislative Fiscal Bureau. He inquired whether the Council has sufficient resources to respond to a legislative directive to draft statewide advisory OWI sentencing guidelines. He also asked whether the Council had any policy concerns regarding a directive to draft sentencing guidelines. Chair Stephens stressed the importance of being responsive to the Fiscal Bureau and Legislature, and asked the Council to discuss an appropriate response. The general consensus was that the Council's role and statutory duties and powers do not currently include projects of this nature. Council member Taylor voiced a concern that working on OWI sentencing guidelines could result in additional requests to undertake similar projects. Council member Christopher inquired as to why there is an interest in statewide guidelines. Attorney Southwick explained that although the supreme court upheld the constitutionality of district-by-district guidelines, some groups still believe it is unfair. Council member Voelker added that several years ago, the Office of the State Courts unsuccessfully attempted to draft statewide guidelines. Council member Pakes stated that perhaps it would be appropriate for the Council to recommend whether a statewide guideline is a good policy, but agreed that the Council is not the appropriate entity to draft guidelines because they affect substantive rights. Judge White expressed concern that a change in the work product of the Council could cause a change in membership, because each of the constituencies that the Council members represent intended for its representative to fulfill the current statutory mandate. Council member Taylor recommended that the Council's response contain a brief and concise explanation of the Council's mission.

The Council agreed by consensus that drafting sentencing guidelines is a substantive matter which exceeds the scope of the Council's current authority to make recommendations regarding procedural matters, that the Council's current budget is not sufficient to undertake a project of that magnitude, and that a directive of this nature would force the Council to place all current projects on hold. Attorney Southwick was directed to draft a response to the Legislative Fiscal Bureau, including an explanation of the Council's mission. Council members Taylor, White and Schultz volunteered to review and comment on the draft response.

VI. Discussion of Request to Review Chapter SCR 81 – Compensation of Court-Appointed Attorneys

Council member La Fleur reported that the Legislative Reference Bureau (LRB) returned a draft of the work group's proposal recommending an increase in the hourly rate of court appointed attorneys by establishing a minimum rate of \$100 per hour for non-indigent cases, with additional factors for courts to consider for rates exceeding \$100 per hour. Council member La Fleur explained that as the work group reviewed the issue, they discovered that a change in rate could potentially impact several other statutes. The work group will schedule a meeting to discuss the LRB draft and prepare their final recommendation to the Council. The work group also discussed whether they saw a need to obtain additional information regarding the rates that are currently being paid by courts. The consensus was that if additional information is needed, they will contact Attorney Southwick.

VIII. Committee Reports

A. Appellate Procedure

Committee co-chair Stephens reported that the committee last met on December 10 and continued to work on draft amendments regarding presentence investigative reports.

The supreme court order granting the Council's petition to amend the rule regarding citation to unpublished opinions can be found at 2009 WI 2.

Finally, she reported that two of the three redrafts of the appellate procedure bills are complete, and Senator Taylor's office is tracking the progress of the third bill.

B. Criminal Procedure

Committee chair Schultz gave a brief update on the project to amend the criminal procedure code. In addition to the three chapters previously received from the LRB, he received chapter 972 on January 6. The subcommittee (Schultz, Stephens, Pakes and Weber) will be meeting to prepare responses to the questions from the LRB drafters.

C. Evidence and Civil Procedure

Committee chair Leineweber reported that the committee is currently working on two key projects: the proposed electronic discovery rules that the Council discussed earlier in the meeting, and a small claims appeal issue brought to the Council by Chief Justice Abrahamson. Attorney Southwick has prepared a research memo regarding the small claims court issue for discussion at their meeting this afternoon.

IX. Other Business

A. PPAC Liaison's Report

There was no PPAC Report. The meeting was canceled due to the weather.

B. Council Attorney's Report

Attorney Southwick informed the Council that the committee of Chief Judges will look at the new court of appeals case, *State v. Ruiz-Velez*, to determine whether a rule change petition is needed.

She notified the Council that Tenney Plaza, the location of the Council's office, has been purchased by Urban Land Interests.

An amended draft of the municipal court bill was disseminated to council members. Council members will notify Attorney Southwick if any member would like this item placed on an up-coming agenda.

X. Adjournment

The Council adjourned by consensus at 11:40 a.m.