

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
January 15, 2010

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

MEMBERS PRESENT: Vice-Chair Beth E. Hanan, Thomas W. Bertz, Michael R. Christopher, Allan M. Foeckler, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Robin L. Ryan, Professor David E. Schultz, Rebecca St. John, A. John Voelker, Honorable Mary K. Wagner.

MEMBERS EXCUSED: Chair Marla J. Stephens, James C. Boll, Honorable Ann Walsh Bradley, Honorable Patricia S. Curley, Professor Jay Grenig, Senator Lena Taylor, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Kate Battiato, Office of Representative Hebl; Eric Peterson, Office of Senator Taylor; and Christopher Gibbs, Office of Senator Lena Taylor.

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

Vice-Chair Hanan called the meeting to order at 9:40 a.m. Eric Peterson introduced Senator Taylor's new staff member, Christopher Gibbs.

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

MOTION: Council member Christopher moved, seconded by Council member Hebl, to approve the minutes with two minor amendments: change "inquest" to "inquiry" on page three, and insert "declaring" before the phrase "a state microbe" on page five. Motion approved unanimously.

**III. Discussion and/or Action Regarding Petition 09-01, Discovery of Electronically Stored Information**

Attorney Southwick explained that as she has been working with supreme court staff in preparation for the January 21 hearing on rule change petition 01-09, a few questions have arisen. Staff has inquired as to whether the Council would object to some minor amendments to the proposal. Prior to this Council meeting, Attorney Southwick distributed a memo outlining the proposed possible amendments, as well as the recommendations suggested by several members of the Evidence & Civil Procedure Committee (Judge Leineweber, Bill Gleisner, Judge Sankovitz, and Professor Grenig) who are preparing to present the petition to the court at the public hearing. She explained that a number of the questions concern punctuation and other revisions to current statutes that were unchanged by the Council's rule petition. The more substantive proposals concern revising several provisions to mirror the language contained in the federal rules. Court staff also inquired as to the Council's thoughts on the use of modified federal rules language. The committee members recommended against modifying the language used in

the federal rules. Altering that language may make it more difficult for courts and parties to look to the federal body of case law for assistance with interpretation of the rules.

MOTION: Council member La Fleur moved, seconded by Council member Hebl, to authorize Attorney Southwick to convey the recommendations contained in her January 13, 2010 memorandum to supreme court staff. Motion approved unanimously.

**IV. Discussion and/or Action Regarding Wisconsin Rules of Evidence**  
**A. Wis. Stat. § 901.07, Rule of Completeness**

Council member Leineweber stated that the Evidence and Civil Procedure Committee spent several months discussing the rule of completeness, and concluded that the rule should be amended to specifically address unrecorded oral statements. Members of the committee agreed by consensus to codify current case law, and prepared a draft recommendation. The recommendation is contained in a memo from Attorney Southwick that was distributed prior to the meeting. Attorney Southwick added that the current rule focuses on a “writing,” which causes confusion regarding whether the rule applies to oral statements. The proposal recommended by the committee removes the distinction between written versus oral and shifts it to recorded versus unrecorded.

MOTION: Council member Leineweber moved, seconded by Council member Bertz, to adopt the recommendation of the Evidence & Civil Procedure Committee as contained in Attorney Southwick’s December 29, 2009 memorandum to the Council. Motion approved unanimously.

**V. Discussion and/or Action Regarding Institute for the Advancement of the American Legal System’s Rules of Civil Procedure Pilot Projects**

Attorney Southwick reminded the Council that the Institute for the Advancement of the American Legal System (IAALS) and the American College of Trial Lawyers (ACTL) have been working on a joint initiative to identify perceived problems of cost and delay in the U.S. civil justice system and to develop possible solutions. The two groups have agreed on a set of Principles that would shape solutions to the problems they have identified. The IAALS and ACTL recently released Pilot Project Rules derived from the Principles. IAALS has also released Civil Caseflow Management Guidelines to provide judges with additional tools to facilitate and evaluate the results of cases with greater efficiency. In the near future, the IAALS also intends to provide measurement tools to monitor and evaluate the results of pilot projects. Attorney Southwick highlighted one change in particular which would encourage courts to tailor discovery to the case by ordering discovery that is proportional to the amount in controversy and complexity of the case. Currently, Georgia and New Hampshire are evaluating recommendations contained in the Pilot Rules as they prepare to launch pilot projects.

Council members generally agreed that abuse of discovery does not appear to be a significant problem in Wisconsin state courts. Attorney Southwick will continue to monitor the

work of IAALS, and any courts that institute pilot projects. She will also confer with the Litigation Section of the State Bar on this issue.

## **VI. Discussion and/or Action Regarding Procedural Concerns with Ghostwriting Legal Documents**

Vice-Chair Hanan introduced a new item brought to the Council by Judge Daniel Anderson & Judge Richard Sankovitz. They have requested that the Judicial Council study amendments to the Rules of Civil Procedure and Rules of Appellate Procedure to deal with the growing phenomena of ghostwriting. Ghostwriting occurs when an attorney writes pleadings or briefs anonymously, without attribution to the attorney. Ghostwriting is part of the unbundling of legal services.

Council member Ptacek stated that judges often find themselves reviewing proposed findings of fact and orders, and it is very helpful for the court to know whether it was drafted by an attorney or a party. Several judges commented that they receive documents which they believe to have been drafted by an attorney, although the party appears unrepresented. Council members discussed the potential for malpractice and some of the ethical aspects of ghostwriting. Eric Peterson added that legislators are often asked by their constituents for legal assistance, especially if the legislator is an attorney, so clarification in this area would be helpful. The Council also discussed that briefs and other documents can easily be plagiarized with the wide spread internet access to legal documents.

Council members agreed by consensus to refer this issue to the Appellate Procedure Committee for further study and a recommendation on the need for procedural rules governing ghostwriting.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Committee member St. John reported that the Appellate Procedure Committee is finalizing a recommendation concerning amendments to the statutes regarding presentence investigations. It will be ready for review by the full Council in the near future. Council member Wagner inquired whether the proposal addresses the assessment process. Council member St. John explained that the proposal does not address risk assessment, but focuses on the process of preparing the report. The primary goals are to improve the accuracy of the information contained in the report and increase the defendant's access to the report.

### **B. Criminal Procedure**

Committee chair Schultz reported that the Legislative Reference Bureau (LRB) has completed drafting the proposed criminal procedure bills, and the subcommittee has received clean copies of all the bills. The subcommittee (Schultz, St. John and Stephens) will be ready to meet to respond to LRB drafters' questions in the near future.

Council member Leineweber suggested adding a future agenda item to discuss procedures for introducing these bills. Council member Wagner suggested an informational hearing to present the proposed amendments to the applicable legislative committees and give a broad overview of their contents. Other potentially interested groups could also be invited to provide input.

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

Committee chair Leineweber reported that the committee continues to review and discuss possible amendments to the rules of evidence. At its meeting later today, the committee will continue to discuss the possible addition of a bias rule, and may resume discussing the “other acts” rule.

Attorney Southwick stated that the petition regarding discovery of electronically stored information (Pet. No. 09-01) has been set for a hearing on January 21 at 9:30 a.m. Attorney Southwick, Committee chair Leineweber, Committee member Gleisner and former Committee member Judge Sankovitz will attend and present at the supreme court hearing on the petition.

## **VIII. Other Business**

### **A. PPAC Liaison’s Report**

Council member Leineweber stated that PPAC has not met, so there is no report.

### **B. Assembly Judiciary Committee Report**

Kate Battiato provided an update regarding the small claims bill (AB 524) that has been introduced and would create a two-tiered system. One tier would remain for amounts in controversy of \$5,000 or less, and a second tier has been added for claims under \$8,000. The second tier would only be available to those parties who file less than 20 small claims cases per year. Under the bill, there would be a penalty for those parties who fail to accurately disclose the number of filings per year. The proposed penalty would include a fine and dismissal of the claim. An amendment has been made to the bill regarding counter-claims and cross claims. Finally, a new fee level has been added for tier one users with claims under \$2,000. The amended bill also contains increased filing fee levels which would be retained by the counties and could be used to offset additional costs.

### **C. Senate Judiciary Committee Report**

Senator Taylor submitted a written committee report. Eric Peterson added that the municipal court bill was approved by the Senate Judiciary Committee.

### **D. Council Attorney’s Report**

Attorney Southwick reported that Council member Pakes has accepted a new position with the State Public Defender’s office, so she has resigned as the Governor’s district attorney

appointee to the Council. Attorney Southwick also announced the candidates nominated for election to the State Bar representative position to the Council, including Catherine La Fleur, William Gleisner, Gregory John Cook, and Paul Sceptur.

On December 4, Attorney Southwick, Judge Leineweber, and Bill Gleisner attended the State Bar Board of Governors' meeting to respond to questions about the e-discovery petition and encourage the board to adopt a motion in support of the petition. The Board voted unanimously to support the petition, but recommended that a provision be added within the statute itself to permit claw back and include reference in the comments to the ability to cost shift.

## **IX. Adjournment**

Vice-Chair Hanan announced that the Evidence & Civil Procedure Committee will meet in the Judicial Council office at noon, and the Appellate Procedure Committee will meet in Room 328NW at noon. The next Judicial Council meeting is February 19, 2010.

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