

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 20, 2015

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Hon. Michael R. Fitzpatrick, Jill M. Kastner, Devon M. Lee, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Professor David E. Schultz, Thomas L. Shriner, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Honorable Jeffrey A. Wagner, Greg M. Weber, Amy E. Wochos.

MEMBERS EXCUSED: William C. Gleisner, Tracy K. Kuczenski, Honorable Gerald P. Ptacek, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Katie Stenz and Cale Battles, Wisconsin State Bar; Nancy Rottier, Director of State Court's office; Scott Kelly, Sen. Wanggaard's office; Ginger Mueller, Rep. Ott's office; Adam Plotkin, State Public Defender's office; Erika Strebel, Wisconsin Lawyer; Mike Ottelien.

I. Call to Order and Roll Call

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

II. Approval of January 16, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Wagner, to approve the January 16, 2015 minutes. Motion approved unanimously.

III. Discussion and/or Action Regarding Judicial Council's 2015-2017 Budget

Prior to the meeting, Attorney Southwick circulated an excerpt from the 2015-2017 Executive Budget proposal pertaining to the Judicial Council. The Governor has recommended elimination of the Council. The proposed budget suggests that the Supreme Court has the authority to recreate the Council and fund it.

Council member Schultz noted that this budget proposal is quite different from previous cuts that have been suggested or approved. When the Council's funding was eliminated during the mid-90's, the budget removed the Council's funding and eliminated staff, but the Council itself remained intact. The Council continued to function after the cuts, although its volunteer members worked at a greatly reduced capacity without staff. The current budget proposal calls for a repeal of Wis. Stat. §758.13, which creates the Council, establishes its membership, and lists its duties and powers.

Council member Shriner suggested that the current budget proposal might be the result of

a misunderstanding. The executive budget staff appears to lack an understanding of the Council's role because the budget proposal seems to suggest that the Council is merely an arm of the supreme court. It fails take into consideration the fact that the Council's statutory membership reaches across all three branches of government, and the Council regularly proposes legislation, as well as rules. Council member Shriner suggested that the Council needs to educate the executive and legislative branches regarding the Council and its work.

Council member Ott agreed with Council member Shriner. He also suggested that due to the Council's relatively low profile, it was easy for the budget staff to recommend elimination and shift the burden to the Council to justify its retention. He suggested drafting a letter to the Joint Finance Committee making a case for the Council's retention by explaining what the Council does and the relatively small amount of money that is needed to retain the Council.

Council member Wanggaard stated that as a legislator, he thought he understood what the Judicial Council did until he started reading in detail about the Council's specific projects and the broad scope of its work. He was surprised to learn of the many different issues and facets of the justice system that are being dealt with by the Judicial Council. He noted that the Council addresses very complex issues that require specialized legal knowledge. If there is no longer an entity like the Council to address those complex issues, the problems will continue to grow. That is likely to cost the state much more in the long term than will be saved in the short term by the Council's elimination. He agreed with Council member Ott's suggestion to draft a letter from the Council to the Joint Finance Committee. He also stated that he and Council member Ott will talk with the chairs of the Joint Finance Committee about the importance of retaining the Judicial Council and urge restoration of funding for the Council in the 2015-2017 budget. He noted the importance of explaining to Joint Finance what the Council really does, and he expressed optimism that the Legislature could be convinced to retain the Judicial Council.

Additionally, Council member Ott urged each member of the Judicial Council to contact his or her state representative and senator about the importance of retaining the Council. He suggested that the contact should be made either in person or by telephone. He noted that in-person communication might be more effective than email or a form letter.

Council member Weber suggested that Attorney Southwick contact each of the entities that make appointments to the Council and urge them to contact Legislators to express their support for retaining the Council. He suggested that the appointing entities could write letters explaining the value of the Council's work and noting ways in which the Council's work has added value to their various initiatives. He suggested that entities such as the Department of Justice and the State Public Defender's office might be able to provide meaningful examples to demonstrate to Legislators that the Judicial Council's work benefits the justice system as a whole, and not just the supreme court.

Vice Chair Blanchard suggested that the Council consider how to rebut the suggestion that the Council be recreated by the supreme court. Council member Fitzpatrick stated that the criminal procedure bill is an example of why the Council should remain an independent agency. Because so many areas of criminal procedure affect substantive rights, many proposed amendments are beyond the scope of the supreme court's rule making authority. Without the

Judicial Council, proposing comprehensive amendments would have been left to the Legislature. That would have been a major undertaking for the Legislative Council and would have detracted significantly from their other responsibilities. Additionally, the work product benefitted greatly from the practical experience of the many attorneys and judges who served as Judicial Council committee members. There is no substitute for the guidance they provided based on their experience in the courtroom litigating or presiding over criminal cases. He offered to convey that example to his representative, Amy Loudenberg, who serves on the Joint Finance Committee.

Vice Chair Blanchard noted the many hours of work donated by the Council's volunteer members, at a huge cost savings to the state. Council member Fitzpatrick stated that not only do members volunteer their time to attend Council and committee meetings, but they also spend a great deal of additional time conducting research, working on draft proposals, and reviewing research and drafts prepared by Attorney Southwick. Through the Judicial Council, the state receives thousands of hours of legal advice at a very minimal cost to the state. Council member Wochos added that some infrastructure is essential to a volunteer-driven organization. She stated that a staff person is crucial to keeping volunteers invested and providing the maximum benefit.

Council member Wanggaard observed that the Council is unique in its make-up because all three branches contribute to the work product, to the benefit of all three branches. If the Council became an advisory body to the supreme court, the benefit to the legislative and executive branches could be lost, along with the voices from those branches. Losing that balance from all three branches would probably have a negative impact on the quality of the recommendations that are produced by the Council. If the recommendations are coming from one branch alone, it is more likely that the recommendations could focus on what is best for that particular branch, as opposed to the Council's current focus on what procedures are best for the justice system as a whole by balancing the needs of all involved. There are fiscal costs linked to the quality of the procedural rules under which the justice system operates. Those costs are borne by both the state and the counties and are likely to increase without the work of the Council.

Council member Shriner suggested that the real source of the problem might be the Judicial Council's name. By containing the term "judicial," it could be assumed that the Council serves only the judicial branch. It appears that there is an effort to sweep both the Judicial Council and Judicial Commission into the supreme court merely because of the use of "judicial" in both their names.

Council member Weber questioned whether the supreme court's appearance of impartiality could be impacted if it were to become the sole funding source for the Council. Council member Ott also noted that the Council's future could continue to be uncertain if the court was its sole funding source because the court could simply decide to cease funding the Council. The decision would be final without the option of appealing to the Joint Finance Committee.

Attorney Southwick questioned whether the Council could retain its legislative members and executive branch appointments if it were created by supreme court rule, noting the

tremendous value that is added by their participation. She cited the criminal procedure bill as an example. Several legislative members were actively involved with the committee that proposed amendments to the bill. As a result, those Legislators have a detailed working knowledge of the process, including the individuals who were involved and the studies, hearings, and debates that were conducted by the drafting committee. She suggested that it would be a step in the wrong direction to lose that unique working relationship between the branches.

Attorney Southwick also asked members to give some thought to the Council's powers and duties as defined in Wis. Stat. § 758.13, including recommending changes in "the organization, jurisdiction, operation and methods of conducting the business of the courts..." She questioned whether the Judicial Council could continue retain those powers and duties as an advisory body to the supreme court, created by the court. While the Council has not made sweeping recommendations regarding the organization of the courts in recent years, she noted that historically, the Judicial Council recommended the creation of the Wisconsin Court of Appeals and drafted the Rules of Appellate Procedure in Wisconsin. She questioned whether the Council could still make such sweeping recommendations if it were to lose its status as an independent agency.

Council member Fitzpatrick asked whether the supreme court was involved in creating the Judicial Council. Attorney Southwick explained that the Council was created by the Legislature in 1951.¹ Council member Wanggaard noted the long list of current projects underway by the Council. He questioned what other body or agency could take up that work. How will elimination of the Council impact the continuity of the work? Will the work be divided up among many different agencies or will all of those projects simply flounder?

Members discussed the very small budget that is allocated to an agency that provides considerable value. The Council's current operating budget is approximately \$114,000 annually. Currently, about 65% of the Council's funding comes from general purpose revenue (GPR). The remainder of the Council's funding is allocated from program revenue (PR) from the director of state courts and the state law library. Prior to the 2011-2013 budget, the Council received all of its funding from GPR.

Council member Wanggaard proposed dividing the budget into two separate issues. First, he recommended that the Council focus on the recommendation to eliminate the Council. If the Council can obtain support from the Joint Finance Committee to retain the Council as an independent agency, then the Council can tackle the issue of its budget, including the source and amount of its funding. Nancy Rottier, Director of State Courts office, stated that although the Executive budget references that the supreme court could recreate the Council as an advisory body, it does not authorize any funding or position authority to staff it.

The Council agreed by consensus to authorize Attorney Southwick to draft a letter to the Joint Finance Committee explaining the Council's work and making a case for why the Judicial

¹ The Judicial Council, created by Chapter 392, Laws of 1951, assumed the functions of the Advisory Committee on Rules of Pleading, Practice, and Procedure established by the 1929 Legislature.

Council should be retained and funded in the 2015-2017 budget. Chair Bertz will sign the letter on behalf of the Judicial Council. Council member Wanggaard stated that it is important to send the letter before the public hearings on the budget begin in mid-March. Attorney Southwick will ask the Council and committee chairs to review a draft of the letter prior to submitting it to the Joint Finance Committee. Members also requested that Attorney Southwick prepare some talking points to guide members in their discussions with Legislators.

IV. Discussion and/or Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure

Attorney Southwick reported that the bill was completed, jacketed for introduction, and turned over to the Council's legislative members for introduction in the Legislature. Council member Ott stated that he and Council member Wanggaard are considering setting a joint judiciary committee hearing in late March, although he expressed some concern whether a March date would give interested parties enough time to review the bill. He stated that the hearing might be pushed back to a slightly later spring date. The bill's authors will be the chairs of the judiciary committees.

V. Discussion and/or Action Regarding Review of Wisconsin Rules of Evidence

Attorney Southwick reported that she has circulated the proposed amendments to the rules of evidence and a request for feedback to potentially interested groups, including the following: Milwaukee County Bar Association; Dane County Bar Association; Western District Bar Association; Eastern District Bar Association; Wisconsin Association for Justice; State Public Defender's Office; Department of Justice; Committee of Chief Judges; Judicial Conference Legislative Committee; Court of Appeals Judges; Wisconsin Association of Criminal Defense Attorneys; Wisconsin District Attorneys Association; Association of State Prosecutors; Professor Keith Findley, University of Wisconsin Law School; and Professor Daniel Blinka, Marquette Law School. She also worked with State Bar staff to draft an article on the proposed amendments. It appeared earlier in the week in the electronic newsletter Inside Track. State Bar staff also indicated that they will run an article on the proposed changes in next month's edition of Wisconsin Lawyer, and distribute an email to State Bar members.

Council Shriner stated that this project is an excellent example of the type of problem that is addressed by the Judicial Council. The comprehensive study and proposed updates to the rules of evidence has been a huge undertaking over a period of several years. It involved many different lawyers and judges with varied backgrounds and expertise and it is the type of work that would probably not be done without the Judicial Council. Attorney Southwick added that this type of project requires input from the lawyers and judges who are in the courtroom every day working with these rules. The Judicial Council is uniquely qualified to conduct this type of study because its members have the necessary qualifications and experience to make these technical recommendations.

Council member Weber noted the importance of involving lawyers who represent all sides when procedural rules are amended. He indicated that the Judicial Council is one of the few places where the Department of Justice and the State Public Defender's office can come

together to work on issues. He suggested that the Department of Justice could have proposed amendments to the rules of evidence, but it would not have been a high priority and work product would not have been as comprehensive and balanced as the work of the Council. Attorney Southwick noted that due to the Council's excellent reputation, she is also able to recruit ad hoc committee members with specialized knowledge or expertise to volunteer their time to assist the standing committees with specific projects. The addition of ad hoc committee members further adds to the diversity and knowledge base of the committee's membership, which results in work product of the highest caliber.

Attorney Southwick stated that the deadline for public comment on the proposed amendments to the rules of evidence is May 14, 2015. The Judicial Council meets on May 16, 2015. At that meeting, the Council can consider the number and type of feedback received, and discuss the next steps in the project. If there is general support for the amendments as drafted, the Council may be ready to proceed with a supreme court rule change petition. If there are suggestions for different amendments, then perhaps the proposals will need to be sent back to the drafting committee to consider further revisions.

VI. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the committee continues to work on reorganizing the procedural rules for prisoner challenges to agency decisions. A new ad hoc member was appointed to the committee to assist with this project. Assistant Attorney General Karla Keckhaver has many years of experience litigating this unique type of case, so her knowledge will be very helpful to the committee.

The committee also continues to study possible amendments to Rule 809.15, and will be reviewing another revised rule draft at its meeting following the Council meeting.

B. Criminal Procedure

Committee chair Blanchard reported that the committee did not meet this month. He and Attorney Southwick will be meeting with the new Attorney General to discuss which of the committee's pending projects may be a priority to the Department of Justice.

C. Evidence and Civil Procedure

Committee chair Shriner reported that members will discuss an amended draft of proposed Wis. Stat. § 887.24, adopting a modified version of the Uniform Interstate Deposition and Discovery Act. The amendments were proposed to address concerns raised by the justices when the supreme court discussed the proposed rule at a recent administrative conference. If committee members approve the draft, it will be on the Council's March agenda for review and possible approval.

The committee is also working on possible amendments to Wisconsin's class action statute to bring it more in line with the federal class action statute. Wisconsin's current class action statute is very out-dated and provides little guidance to the courts on issues such as class certification.

VII. Other Business

A. PPAC Liaison's Report

There was no PPAC report.

Council member Weber previously served on the PPAC subcommittee that developed policies and rules governing the use of video-conferencing in courts. He announced that PPAC is forming a new subcommittee to review those policies and rules and to make recommendations if any amendments are needed. He urged members to contact him if they have any recommendations.

B. Council Attorney's Report

Attorney Southwick had no further report.

VIII. Adjournment

The Council adjourned at 10:30 a.m.