

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 17, 2017

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, Christian A. Gossett, R. Duane Harlow, Devon M. Lee, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright.

MEMBERS EXCUSED: Sherry D. Coley, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Erika Strebel, Wisconsin Law Journal, Michael Queensland, Legislative Council.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:30 a.m. Attorney Southwick circulated the roll call sheet.

II. Approval of January 20, 2017 Minutes

MOTION: Council member Wagner moved, seconded by Council member Myers, to approve the January 20, 2017 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Draft Supreme Court Rule Change Petition to Amend Wis. Stats. §§ 803.08 and 426.110, Class Actions

Attorney Southwick circulated a revised draft of the petition prior to the meeting. She explained that s. 803.08(14) was added to retain the prohibition in current law against class action suits against the state seeking tax refunds. She also noted that s. 426.110(16) was amended to delete a cross reference to a subsection that would be repealed by the recommended amendments to that section.

MOTION: Council member Wagner moved, seconded by Council member Myers, to approve the petition for filing and direct Attorney Southwick to work with the Evidence & Civil Procedure Committee to draft a supporting memorandum. No further review was requested by the Council prior to filing it with the supreme court. Motion approved unanimously with Council members Ott and Wanggaard abstaining.

IV. Discussion and/or Action Regarding Recommendation to Amend Wis. Stats. §§ 809.107 and 809.19, Appellate Briefs in Multiparty Cases

Attorney Southwick circulated a revised draft of the petition prior to the meeting. She noted that the recommendations regarding the appellate rules have been split into two separate petitions. (When the Council initially reviewed these proposed amendments, they were included with the proposed amendments to the record on appeal that will be discussed as Item V on the agenda.)

Attorney Southwick explained that in s. 809.19(5)(b), the Legislative Reference Bureau suggested changing “must” to “may” to comply with current legislative drafting standards. However, upon further review, the Appellate Procedure Committee determined that the change would create internal inconsistency in the rules because other provisions in 809.19 use “must.” Therefore, the committee recommends retaining “must.”

Attorney Southwick noted that a new sentence was added s. 809.19(8m) in response to a request from the State Bar’s Appellate Practice Section. The Section felt it would be helpful to guardians ad litem if the rule contained a cross reference to s. 809.107.

MOTION: Council member Lee moved, seconded by Council member Myers, to approve the petition for filing and direct Attorney Southwick to work with the Appellate Procedure Committee to draft a supporting memorandum. No further review was requested by the Council prior to filing it with the supreme court. Motion approved unanimously with Council members Ott and Wanggaard abstaining.

V. Discussion and/or Action Regarding Recommendation to Amend §§ 809.15, 809.19, 809.30, 809.32, and 885.42, Record on Appeal and Videotape Procedure

Attorney Southwick circulated a revised draft of the petition prior to the meeting. The State Bar Appellate Practice Section previously provided feedback suggesting that attorneys occasionally wish to supplement the record with something that was never presented or considered at the trial level. The Section felt that the amendment to s. 809.15 might cause confusion because the title references “supplements.” The Council asked the Appellate Procedure Committee to consider this concern. The committee declined to modify its recommendation, noting that current s. 809.15(1)(a) states, “The record on appeal consists of the following unless the parties stipulate to the contrary.” Committee members agreed that the parties could supplement with additional material upon stipulation by the parties so the term “supplement” should be retained.

Council member Shriner inquired whether the Appellate Practice Section was suggesting that the rule should permit the parties to supplement with material that was not introduced at the trial court level. Attorney Southwick responded in the affirmative. Council member Shriner agreed with the committee’s recommendation to deny that amendment. He suggested that in the appropriate case, the parties could suggest that the court take judicial notice, but he was generally opposed to permitting material to become part of the record if it was not before the trial court.

With regard to s. 809.15(3)(b), the court of appeals originally suggested modifications to the proposed language to reflect the use of electronic records and the absence of the transfer of paper records. This draft reflects the Appellate Procedure Committee's recommendation after considering the suggestions from both the court and the Judicial Council. Council member Blanchard inquired whether the term "transmit" is meant to signify the change to electronic records. Attorney Southwick stated that the rule previously used the phrase "the court in which the record is located..."

MOTION: Council member Gossett moved, seconded by Council member Stertz, to approve the petition for filing and direct Attorney Southwick to work with the Appellate Procedure Committee to draft a supporting memorandum. No further review was requested by the Council prior to filing it with the supreme court. Motion approved unanimously with Council members Ott and Wanggaard abstaining.

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

Prior to the meeting, Attorney Southwick circulated a portion of the Governor's budget proposal that recommends elimination of the Judicial Council. Attorney Southwick explained that because the Judicial Council is currently funded from program revenue through the Director of State Court's office, the Governor's recommendation has no monetary impact on the state budget. In other words, it does not create any cost savings. It simply eliminates the Judicial Council and places the burden on the supreme court to recreate it.

Council member Moran explained that one of the problems associated with the Council currently being unfunded in the budget occurs when the state calculates the cost to continue operating for all state agencies, including increases for salary and fringe benefits, and increased costs such as rent. Since the Council is not funded in the budget, the Judicial Council does not receive the base budget adjustments and standard increases that the other state agencies receive. Over time, the Council's operating budget essentially gets smaller and smaller to a point where it can no longer continue to function.

Council members discussed why the executive budget continues to propose eliminating the Judicial Council. In previous budget years when elimination of the Council was proposed, no person or group has ever come out in support of it. In contrast, many groups and individuals have consistently supported the Council and its work and urged its retention. Council member Shriner noted that the budget proposes the elimination of a number of small agencies and boards, not just the Judicial Council. It appears that the goal is to eliminate small agencies and advisory bodies to consolidate control within fewer large agencies.

The budget proposal also contains a suggestion that the supreme court can recreate an advisory body to replace the Council. Council member Gleisner noted that both the supreme court and the legislature benefit from the Judicial Council's studies and recommendations, so it does not seem appropriate to categorize the Council as solely an advisor to the court. It also does not seem appropriate that a court-created advisory body should advise the legislature, so under

the Governor's proposal, the legislature stands to lose a valuable service provided to it by the Council. He cited the criminal procedure recommendations as an example.

Council member Ott explained that a team of people draft the executive budget. He speculated that the drafter working on the portion containing the Judicial Council saw an agency that he or she did not understand and recommended elimination as a way to simplify it. Council member Ott stated that he will speak with the Assembly co-chair of the Joint Finance Committee to urge retention of the Council in its current statutory form.

Council member Wanggaard stated that he will advocate for the retention and funding of the Council. He also asked Council members to assist him by contacting legislators, especially members of the Joint Finance Committee. He provided a list of Joint Finance Committee members to Attorney Southwick and she will distribute it to Council members with their contact information. Council member Wanggaard encouraged members to make calls because they are usually more influential than emails.

Council member Wanggaard noted all the different topics that the Council studies and the broad scope of its work. He suggested that there is no other agency or body that could do this work if the Council is eliminated. He praised the efficiency of the Council and noted that it is partially due to its unique membership. Council member Wanggaard spoke in support of retaining the Council as it exists under s. 758.13. By having representatives from all branches of government and the private sector, the Council is able to undertake studies and recommendations that other groups would not be in a position to accomplish. He also noted that if recommendations were issued by a group that was not as diverse and well-represented as the Judicial Council, the recommendations would not be widely accepted. He asked members to provide him with examples of Judicial Council projects that solved problems or improved a process that resulted in a benefit to the public or a cost savings. He also noted that many Council and committee members are attorneys employed in the private sector and the hours that they volunteer is very valuable. He expressed his opinion that the Council needs to be funded through a separate line item because the Council's effectiveness would be greatly diminished if it lost its staff person. He praised the efficiency and professionalism of the Council's attorney.

Council member Moran suggested that if the Council remains wholly independent, it will continue to be vulnerable to efforts to eliminate or consolidate small state agencies. Council member Wanggaard agreed and clarified that whether the Council is independent or whether it is administratively attached to the Director's office, it needs its own funding source to retain its neutrality and credibility.

Council member Moran stated that he will be meeting with the supreme court to discuss the Judicial Council and other budget-related concerns. He asked Council members to voice their long-term goals for the Judicial Council and its funding so that he can convey that information to the court.

ACTION: Members agreed by consensus that their goal is to retain the Judicial Council as it is set forth in s. 758.13, and to be administratively attached to the Director of State Court's office with the budget allocating funds from general purpose revenue to the Director's office for the

purpose of funding the Judicial Council and its staff. Council members Ott, Wanggaard, Harlow, Barber, and Gossett abstained.

VII. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the committee will work with her to draft the supporting memorandums for the two petitions approved at today's meeting. The committee also continues to study substitution and withdrawal of counsel at the appellate level and the committee is nearing completion of a proposed rule.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee continues to study discovery rules and the discovery process in criminal cases. The committee surveyed prosecutors and defense attorneys to identify problems with the current discovery process. The committee is currently considering the usefulness of model checklists to aid law enforcement and attorneys.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee will work with Attorney Southwick to finalize the supporting memorandum to advance the class action petition that was approved by the Council.

The committee will review a memorandum from Professor Dan Blinka in response to the court's concerns with supreme court petition 16-02 proposing amendments to various evidence rules. With the guidance from Prof. Blinka, the committee will draft an amended petition addressing the court's concerns.

Additionally, the committee is studying the 2015 amendment to federal Rule 37(e) regarding discovery sanctions for failure to preserve evidence and considering whether Wisconsin's rule (s. 804.12) should be amended consistent with the federal changes.

Attorney Southwick reported that the court has reached agreement on the order regarding petition 16-01 to repeal the Deadman's statute. She anticipates that it will be released very soon.

VIII. Other Business

A. PPAC Liaison's Report

Council member Moran reported that PPAC has not met. The next meeting is scheduled on February 21, 2017.

B. Council Attorney's Report

Attorney Southwick reported that the Judicial Conference appointed two new members to the Council. Judge Eugene Gasiorkiewicz, Racine County District Court, was selected to fill the vacancy created by the recent retirement of Judge Ptacek. Judge Gasiorkiewicz will be joining the Council in March. Judge Scott Needham, St. Croix County Circuit Court, was selected to replace Judge Fitzpatrick following his anticipated election to the Court of Appeals. Judge Needham is expected to join the Council in September.

IX. Adjournment

Council member Ott stated that he received a request to consider amending s. 969.01(4). Currently, the statute states that bail "shall be only in the amount found necessary to assure the appearance of the defendant." The proposal would amend the provision to allow bail to be set to secure the defendant's appearance and to ensure compliance with non-monetary conditions of release. Council member Ott noted that this change would require both an amendment to s. 969.01(4) and an amendment to the Wisconsin Constitution. He asked members to consider the proposal and contact his office with their thoughts on this issue. Attorney Southwick also stated that if members would like to discuss the issue, she will place it on a future agenda.

The Council adjourned by consensus at approximately 10:50 a.m.