

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
March 20, 2009

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

MEMBERS PRESENT: Chair Marla J. Stephens, Michael R. Christopher, Honorable Patricia S. Curley, Honorable George S. Curry, William C. Gleisner, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Robert L. McCracken, Stephen R. Miller, Kathleen A. Pakes, Senator Lena Taylor, Greg M. Weber.

MEMBERS EXCUSED: Vice-Chair Beth E. Hanan, Honorable Ann Walsh Bradley, Allan M. Foeckler, Professor David E. Schultz, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Madu Enwemwa, Research and Policy Advisor for Senator Taylor; Kate Battiato, Office of Representative Hebl; Nancy Rottier, State Courts Legislative Liaison.

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

Chair Stephens called the meeting to order at 9:40 a.m.

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

The minutes were approved by consensus with no amendments.

**III. Discussion of Wisconsin Rules of Evidence**

Marquette University Professor Daniel Blinka gave a presentation on the Wisconsin Rules of Evidence, highlighting some changes that he believes will improve the Wisconsin rules. He explained that in formulating his recommendations, he sought input from approximately one hundred circuit court judges. He discussed uniformity and the lack thereof between the Wisconsin rules and the federal rules, explaining that Wisconsin actually adopted the federal rules about a year prior to their federal adoption. During that year, the federal rules were subject to further revision, so the rules diverged from their inception.

He pointed out that judicial notice in criminal cases is addressed in Wisconsin case law, but not under the rules of evidence. By comparison, the federal rules distinguished between notice in civil cases and criminal cases. He opined that relevancy rules can be a minefield, and he does not recommend any changes. However, he did suggest the addition of a pretrial notice provision so that admissibility could be resolved in advance of trial, and pointed out that *State v. Sullivan*, 216 Wis.2d 768 (1998), provides a good road map for determining admissibility. With regard to privileges, Professor Blinka stated that many of the relationships identified under Wisconsin law were created by the legislature, so amendments are likely to be very political. He pointed out that privilege in the corporate context is a grey area in Wisconsin. While the federal

courts rely on *Upjohn Co. v. United States*, 449 U.S. 383 (1981), there is no comparable rule or case law on point in Wisconsin. With regard to opinion testimony, he addressed some of the differences between expert testimony under the federal rules and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and Wisconsin law. He discussed the “limited gatekeeper” role of Wisconsin judges, but suggested that the current Wisconsin rules are appropriate for the needs of Wisconsin courts and litigants, and he does not recommend adopting the federal approach.

Professor Blinka suggested that the Council review the rules of evidence and recommend amendments to reflect current case law, correct deficient rules, and fill some gaps in the rules.

The Evidence & Civil Procedure Committee was tasked with reviewing the rules of evidence and making a recommendation to the Council regarding possible amendments.

#### **IV. Discussion of Request to Review Chapter SCR 81 – Compensation of Court-Appointed Attorneys**

Council member La Fleur reported that the workgroup conferred again regarding the draft bill prepared by the Legislative Reference Bureau (LRB) reflecting a two-tiered approach to determine rates for court appointed attorneys. The workgroup concluded that given the current economic state, there is no funding to accomplish the changes, so they decided to abandon the draft legislation and focus on the original Supreme Court request. However, since their last meeting, Council member Taylor, who did not participate in the last meeting, has opposed that decision.

Council member Pakes observed that the original Supreme Court request asked for a recommendation on Supreme Court Rule 81, which sets a \$70.00 per hour minimum for court appointed attorneys, but also allows for a higher rate, so she doesn’t believe a change is necessary. She further stated that the draft prepared by the LRB impacts many different chapters, and is a much larger project than the workgroup had originally believed.

Council member Taylor expressed her opposition to the position taken by the workgroup at their last meeting, stating that the workgroup should not consider the financial impact of their recommendation. She requested that the workgroup meet again to discuss the matter further and prepare a report to the Council.

Council member La Fleur stated that the draft legislation impacts court appointments in many different types of cases, and it is her understanding that the original request sought a recommendation regarding rates for guardian ad litem in family law cases. Chair Stephens clarified that although the original request came from a family law attorney, the Supreme Court’s request is much broader. Rule 81 is applicable to court appointed attorneys in all cases, so the workgroup should not limit their review to family law matters, but should consider all court appointed attorney situations potentially impacted by Rule 81.

Chair Stephens asked the workgroup to meet again and prepare a recommendation for the Council, even if that recommendation involves a majority and minority position. Council

member La Fleur agreed, but stated that professional obligations will prevent her from convening another workgroup meeting prior to the next Council meeting.

#### **V. Discussion and/or Action Regarding Proposed Electronic Discovery Rule Change Petition**

Council member Leineweber reported that the Evidence & Civil Procedure Committee has nearly completed drafting the petition, and will hopefully finalize it at their meeting later in the day. Their goal is to get it back to the full Council with time to complete their review and grant final approval to file it with the Supreme Court prior to the end of the council year in June.

#### **VI. Discussion and/or Action Regarding Parliamentary Rules and Procedures for Conducting Meetings**

Chair Stephens proposed that the Council adopt the Modern Rules of Order as the official parliamentary rules for the Judicial Council. She explained that the Modern Rules allow the body to proceed by consensus, and are much less complex than Robert's Rules of Order. She suggested that if the Council adopts the Modern Rules, that members receive a copy of the book, but return it to the Council library upon completion of their term(s) of service on the Council to save money. Several Council members inquired about reviewing the rules prior to their adoption. She passed around her personal copy of the book for review during the meeting, and explained that these are the procedural rules that she has been informally using while presiding over the Council meetings. Council member Taylor questioned the need to adopt rules of procedure, and she and Council member Curry opposed the purchase of books.

#### **VIII. Committee Reports**

##### **A. Appellate Procedure**

Chair Stephens reported that the Appellate Procedure Committee will meet at noon and hopefully complete their review and discussion of the comments received regarding the draft presentence investigation report proposals.

The three appellate procedure bills have been introduced as companion bills by Senator Taylor and Representative Hebl and other bi-partisan co-sponsors. They are currently in committee, and Chair Stephens will testify at the anticipated hearings.

##### **B. Criminal Procedure**

Attorney Southwick stated that four chapters have now been re-drafted by the Legislative Reference Bureau and returned to the subcommittee with LRB's questions. She spoke with the LRB drafter, who indicated that two of the three remaining chapters are back from editing, and should be completed in the near future.

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

Committee chair Leineweber repeated that the committee will meet following the full Council meeting to finalize the draft petition regarding the proposed electronic discovery rules. The committee is also simultaneously moving forward on the small claims appeal issue brought to the Council at the request of Chief Justice Abrahamson, and will discuss how to proceed with regard to their review of the rules of evidence.

## **IX. Other Business**

### **A. PPAC Liaison's Report**

Judge Leineweber reported that he will be giving a presentation regarding video conferencing. In preparation, he is collecting anecdotes regarding operation of the new video conferencing rules. Council member Weber offered to provide some information received by the Department of Justice.

### **B. Council Attorney's Report**

#### **1. Budget Update**

Attorney Southwick reported that the Judicial Council was not one of the agencies asked to appear before the Joint Finance Committee to discuss their budget request, although she and Chair Stephens will attend one or more of the JFC public hearings. Attorney Southwick is preparing testimony for the committee.

#### **2. Citation to Unpublished Opinions Committee**

When the supreme court issued the order regarding citation of unpublished opinions, the court created a committee to gather information regarding the potential impact of the rule. Attorney Southwick was designated as the Council's representative on that committee, which met on March 12. The committee discussed changes that various agencies may be making in anticipation of the rule change, and how to document changes implemented following the rule, as well as changes to internal procedures, research, and other consequences of the rule amendment.

#### **3. Miscellaneous**

Professor Grenig generously donated to the Council library copies of his publications including the Wisconsin Practice Series Civil Procedure and Discovery, Wisconsin Pleading and Practice, and a resource on Electronic Discovery. The Council expressed sincere gratitude.

Attorney Southwick reminded everyone that the Council's annual breakfast is scheduled for their June meeting. She asked members with a preference for a location or other suggestions to please let her know.

At this time, Council member Leineweber reopened the discussion regarding the adoption of parliamentary rules. He suggested that the Council adopt rules of procedure without ordering a copy of the rules for every member. Several members offered to donate copies of the Modern Rules of Order.

Council member Taylor questioned the purpose of the Council breakfast. Chair Stephens explained that it is a tradition for the Council to host an annual breakfast meeting for all current and past council members. In addition to a regular business meeting, it is an opportunity to present awards and recognition for the volunteer services of all Council and ad-hoc committee members, as well as to discuss current and past projects, and receive suggestions from members of the legal community who previously served on the Council over the years. Council member Taylor suggested that the Council cancel the breakfast this year for budgetary reasons.

Council member Hebl announced that the Assembly Judiciary Committee will hold a public hearing on the three appellate procedure bills on April 21<sup>st</sup>. Chair Stephens will testify at that hearing. Council member Taylor will provide the date for the Senate hearing.

## **X. Adjournment**

The Council adjourned by consensus at 11:35 a.m.

Attorney Southwick asked Council members to please bring their nametags to the next meeting, or leave them with her before departing.