

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
March 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, William C. Gleisner, Devon M. Lee, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Thomas L. Shriner, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Honorable Annette Kingsland Ziegler.

**MEMBERS EXCUSED:** Jill M. Kastner, Tracy K. Kuczenski, Benjamin J. Pliskie, Professor David E. Schultz, Honorable Jeffrey A. Wagner, Greg M. Weber, Amy E. Wochos.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Karla Keckhaver, Department of Justice; Cale Battles, Wisconsin State Bar; Nancy Rottier, Director of State Court's office; Kyle Koenen, Sen. Wanggaard's office; Ginger Mueller, Rep. Ott's office; Adam Plotkin, State Public Defender's office.

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

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

**II. Approval of February 20, 2015 Minutes**

MOTION: Council member Myers moved, seconded by Council member Lee, to approve the February 20, 2015 minutes. Motion approved, with Council member Ziegler abstaining.

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

Attorney Southwick reported on the efforts that are being made by both current and former Council members with regard to testifying before the Joint Finance Committee in support of retaining the Judicial Council in the 2015-17 budget.

Prior to the meeting, Attorney Southwick circulated a list of talking points previously requested by members for use when contacting Legislators regarding the Council's budget. Attorney Southwick has also contacted several individuals who appoint members to the Council, including Attorney General Schimel, Public Defender Thompson, Dean Kearney, and Dean Raymond. She asked that they all contact the Chairs of the Joint Finance Committee and express their support for the continued operation of the Judicial Council.

Council member Ott reported on his efforts in support of the Council, including discussions with several supreme court justices and the Governor's office. The Governor's office has indicated that the Governor is not opposed to statutorily retaining the Judicial Council. The

question is funding. Council member Ott stated that he will be providing a motion to his Joint Finance Committee contact. The motion will be to retain the Judicial Council, including its full funding. Council member Ott urged all members of the Judicial Council to contact their legislators and urge them to speak to their contacts on the Joint Finance Committee about supporting the motion to retain the Judicial Council. He stated that members of the Assembly refer to their Joint Finance Committee contact person as a "budget buddy." He offered to speak with any legislators who may have questions about this issue.

Council member Wanggaard reported that he has spoken with the Chairs of the Joint Finance Committee and Representative Vos regarding retaining the Judicial Council. He also urged Council members to make phone calls to their legislators.

Council member Ziegler stated that she also spoke with the Governor's office. Her impression was that the Governor's office is not opposed to the Legislature acting to restore the Judicial Council in the budget.

Council member Ott reported that he recently testified before the Joint Legislative Council Committee regarding the study committee's bill on the transfer of structured settlements. During his testimony, he noted that the Judicial Council identified the need for a law governing the transfer of structured settlements and requested that a study committee consider it. He also notified the committee that the criminal procedure bill came directly out of the Judicial Council. The Joint Legislative Council Committee is made up of about 1/6 of the Legislature, including many legislators who are in leadership roles, so his testimony made a strong case for the Council and its work.

Members discussed the issues surrounding the suggestion that the Council could be recreated by the supreme court. Council member Ziegler noted that the Council is created by statute so if the statute is repealed, the Council ceases to exist. She also noted that if the Council ends up relying on the courts for funding, it would be competing with many groups for a portion of the funds from a limited block grant. It would be best if the Council remained an independent agency funded in the budget.

Attorney Southwick expressed concern that the Council cannot be recreated by the supreme court if Wis. Stat. § 758.13 is repealed because the supreme court does not appear to have the authority to order Legislators, the Attorney General, Public Defender, or Deans of the law schools to serve on the Council. While the court could appoint some type of committee, its membership would probably not be as distinguished and diverse as the Judicial Council's membership under s. 758.13.

Council member Blanchard noted the importance of funding a staff position for the Judicial Council. A volunteer body like the Judicial Council is much less effective and efficient without the support of a staff person. In the executive budget, no position authority was given to the supreme court to staff the Council. Council member Gleisner noted that the Council had a very difficult time successfully completing projects during previous years when it was without staff. Attorney Southwick stated that in the eight years prior to restoration of a staff position, the Council was unable to achieve passage of any bills and its passage rate for supreme court rule

changes was about 55%. Since the restoration of funding for a full-time staff person, the Council has had three bills enacted by the Legislature with another major bill currently pending (criminal procedure code amendments), and its passage rate on supreme court rule change petitions has gone up to 100%.

Council member Wanggaard spoke in support of retaining the Judicial Council as an independent agency due to the complex nature of the Council's work. He questioned whether any other group in state government is equipped to take on these types of complex projects. Because the Council is a place where all three branches can come together to tackle these difficult issues, it is uniquely situated for the type of work it has been tasked with performing. As an example, Council member Wanggaard pointed to the criminal procedure bill drafted by the Council and recently introduced in the Assembly. This complex piece of legislation required the expertise of attorneys, judges and other professionals representing many different interests. The Judicial Council was able to bring those different interests together, with great results. Attorney Southwick agreed, and noted that the Judicial Council and its committee members donated approximately 748 hours to attending meetings in 2014. In addition, they also donated many additional hours to meeting preparation, travel, and research and drafting efforts.

Council member Ziegler suggested that the Judicial Council's treatment in the executive budget might stem from having the word "judicial" in the agency title. If the Judicial Council is retained in the budget, perhaps the Legislature should change its name. Council member Shriner suggested "Inter-branch Council" to convey that the Council's work provides a benefit to all branches of state government, not just the judicial branch.

The legislative members urged Judicial Council members to contact their legislators soon because the question of the Judicial Council's restoration will likely be decided by the Joint Finance Committee prior to the next Judicial Council meeting. The funding issue may take longer to resolve. Members discussed that the Council has strong bi-partisan support from its past legislative members so Council members should contact their Legislators regardless of their party affiliation.

#### **IV. Discussion and/or Action Regarding Supreme Court Rule Change Petition 13-16, Uniform Interstate Deposition and Discovery Act**

Prior to the meeting, Attorney Southwick circulated a non-final supreme court order, filed March 12, 2015; a draft amended petition recommended by the Evidence & Civil Procedure Committee; and a memorandum, dated March 13, 2015, explaining the changes in the amended petition.

Council member Shriner reported on the history of rule petition 13-16. The Judicial Council previously approved the filing of a supreme court rule change petition requesting an amendment to adopt a modified version of the Uniform Interstate Deposition and Discovery Act (UIDDA). He explained that the proposed rule provides a simple procedure for out-of-state attorneys to obtain discovery from Wisconsin residents who are not a party to the out-of-state litigation. A process is needed because the out-of-state court does not have jurisdiction over

Wisconsin residents. The current process to obtain discovery is cumbersome and expensive, and requires the involvement of a Wisconsin judge.

The proposed rule allows out-of-state attorneys or parties to obtain a Wisconsin subpoena from the clerk of court or through a Wisconsin attorney. It also provides a procedure for the Wisconsin resident to challenge the subpoena by initiating an action in the Wisconsin circuit court where the witness resides. Wisconsin discovery rules will apply to any challenges or enforcement actions.

The original rule change petition was filed with the supreme court on November 15, 2013. A public hearing was held on September 29, 2014, and the court discussed the proposed rule at its administrative conference on December 5, 2014. At the conference, the court had some questions and concerns about the proposed rule and referred it back to the Judicial Council to address those issues. The Evidence & Civil Procedure Committee has spent the past several months revising the proposed rule to address the issues raised by the court at its December 5, 2014 administrative conference and set forth in the March 12, 2015 order.

Council member Blanchard asked if the recommended changes are technical in nature. Council member Shriner responded in the affirmative, and cited as an example the deletion of federally recognized Indian tribes from the definition of “state.” Council members discussed tribal courts in Wisconsin, and noted that procedural rules are generally not the same from one tribe to another. Members generally agreed that this was an appropriate change.

Attorney Southwick explained that the Evidence & Civil Procedure Committee modified the Uniform Act to conform to Wisconsin law, as many other adopting states have done previously. Generally, the questions and issues raised by the court were not addressed in the original Uniform Act, so the committee personalized the Act a bit more to address those concerns. For example, the Uniform Act does not address the issuance of subpoenas by lawyers because not all states permit it. Wisconsin attorneys are authorized to issue subpoenas under current law, so the proposed rule contains an additional provision addressing subpoenas issued by an attorney.

Attorney Southwick summarized the other changes that the committee recommended to the proposed rule. She noted that the rule now clearly requires that discovery must be conducted in the county where the witness resides. If the witness is a business, discovery must be conducted in the county where the witness “does substantial business.” Council member Shriner noted that the language was borrowed from the Wisconsin venue statute. To minimize the burden on the clerks of court, the amendment requires the party seeking the subpoena to list the county where the witness resides. Amendments were made to clarify that the clerks’ duties under the proposed rule are ministerial. Language was added to a Note to clarify “If there is insufficient space on the subpoena form, the subpoena can be supplemented with additional material.” Council member Shriner noted that the court’s forms committee might also elect to amend the subpoena form, if the proposed rule is adopted.

**MOTION:** Council member Myers moved, seconded by Council member Wanggaard, to approve the amended petition recommended by the Evidence & Civil Procedure Committee.

Motion approved with Council members Ott and Ziegler abstaining. Attorney Southwick will file the amended petition with the supreme court. Members agreed by consensus that Attorney Southwick should also prepare and file a supporting memorandum based on her memo to the Council, dated March 13, 2015.

## **V. Discussion and/or Action Regarding Bill Amending the Rules of Criminal Procedure**

Attorney Southwick reported that the criminal procedure bill drafted by the Judicial Council has been reintroduced as Assembly Bill 90. Council member Ott reported that interested groups, including the Department of Justice, are currently reviewing the bill. He hopes that if they have any concerns, those issues can be resolved in advance of the public hearing on the bill. Council member Ott explained that the Department of Justice is also working on a fiscal note, so that may cause a slight delay in scheduling a public hearing. He added that the fiscal note is not his greatest concern. He is more concerned about the substance of the bill and ensuring that it has broad support from the criminal justice system.

Council member Wanggaard added that Senator Risser has also agreed to co-author the bill with the Council's legislative members and Representative Hebl, giving the bill bi-partisan support from both houses.

## **VI. Discussion and/or Action Regarding Review of Wisconsin Rules of Evidence**

Attorney Southwick reported that a notice regarding the proposed changes to the Rules of Evidence was published in this month's edition of Wisconsin Lawyer without cost to the Judicial Council.

Attorney Southwick was invited to speak to the Committee of Chief Judges regarding the proposed changes. The committee suggested that a copy of the proposal should be circulated to all circuit court judges. Attorney Southwick will work with court staff to distribute the information.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Committee chair Ptacek reported that the committee continues to work on reorganizing the procedural rules for prisoner litigation. The committee also continues to study the rules in ch. 809 regarding the record on appeal. The committee is nearing completion of a draft of proposed amendments for both projects.

Assistant Attorney General Karla Keckhaver was appointed as an ad hoc member of the committee. She has many years of experience litigating prisoner challenges, which is a unique type of case. She stated that the current rules are scattered throughout the statutes, and they are very difficult to locate and follow. She expressed her support for the proposed changes, and stated that it will be very helpful to those who litigate in this area.

Attorney Southwick noted that the committee is also working to resolve some internal inconsistencies in the rules regarding prisoner litigation. Council member Van De Hey reported that in his experience, the current procedures are so complicated that prisoners often do not even try to follow them when filing a case, and instead, they seek ways to by-pass them.

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

Committee chair Blanchard reported that the committee did not meet this month. He and Attorney Southwick are still working to schedule a 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 the committee continues to work 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. As a result, Wisconsin courts look to federal rules and case law for procedures without the benefit of Wisconsin rules for applying it. The committee is currently studying federal Rule 23(c), which is the heart of the class action rule and provides guidance on issues such as how to certify a class, appoint counsel, and provide notice.

### **VIII. Other Business**

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

Nancy Rottier reported that PPAC had a short business meeting followed by a meeting with the supreme court. The focus of the meeting was to discuss the various projects that the subcommittees are studying. She also noted that the National Institute of Corrections has selected Wisconsin to receive a grant to advance evidence based decision-making efforts statewide. Members discussed the process for evidence-based decision-making.

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

Attorney Southwick had no further report.

### **IX. Adjournment**

The Council adjourned at 10:45 a.m.