



## STATE OF WISCONSIN – JUDICIAL COUNCIL

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### MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN March 23, 2018

The Judicial Council met at 9:35 a.m. in Room 328 NW, State Capitol, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair Thomas W. Bertz; Sarah Walkenhorst Barber; Sherry Coley (by phone); Judge Eugene A. Gasiorkiewicz; William C. Gleisner; Devon Lee; John R. Orton; Dennis Myers; Representative Ott (by phone); Benjamin Pliskie (by phone); Thomas L. Shriner; Judge Robert P. VanDeHey (by phone); Senator Van H. Wanggaard; and Judge Jeffrey Wagner (by phone).

**MEMBERS EXCUSED:** Justice Annette Kingsland Ziegler.

**OTHERS PRESENT:** Erika Strebel, Wisconsin Law Journal; Julie Tessmer, State Law Library; Lynn Davis, State Bar.

#### **Agenda Item I: Call to Order and Roll Call.**

Chair Bertz called the meeting to order at approximately 9:35 a.m. with Bill Gleisner as Acting Secretary. Regarding the Minutes of the Last meeting, after a correction to page 6 was noted (changing “Criminal” to “Appellate”), the Minutes of the February 16, 2018 Meeting were approved without dissent.

#### **Agenda Item II: Follow-up concerning acknowledgement of the Distinguished Service of Judge Brian Blanchard and consideration of Plaque Bids.**

Report by Mr. Gleisner: Based on proposed plaques distributed before the meeting, Mr. Gleisner expressed support for the fourth plaque. **MOTION:** by Judge Gasiorkiewicz, seconded by John Orton to approve the fourth plaque.

Motion passed and Mr. Gleisner noted that the plaque will cost \$120.38. Mr. Gleisner offered to pay as a contribution to the State of Wisconsin, Judicial Council. but stated contributions would be welcomed.

The record showed that contributions were made by Council members of \$135 and Mr. Gleisner would put the excess in a banking account. It was requested that the names of contributors not be placed in the minutes. It was determined that the plaque should be given to the Judge in June of this year. However, the Assembly Parlor is not available. Senator Wanggaard offered to arrange for use of the Senate Parlor for the June meeting this year, which was determined to be June 15, 2018. Mr. Gleisner offered to order the plaque and to have it available for presentation to Judge Blanchard at the June 15<sup>th</sup> meeting in the Senate Parlor.

**Agenda Item III: Report by Attorney Orton concerning the status of AB 773 and Senate Bill 645. Confirmation of transmittal of the Council Resolution to the Judiciary Committees of the Senate and Assembly.**

Mr. Orton stated that it would be better if Senator Wanggaard were to deliver the report. The Senator stated that there was a lot of pressure from outside groups that resulted in the passage of the legislation. However, the Senator recognized all the work done by the Judicial Council, especially in the area of class actions.

The Senator noted that it was his position that if you are going to adopt the federal rule that's one thing, but if you are going to adopt the federal rule and then change it, then that is not adopting the federal rule. The Senator was in favor of adopting what the Supreme Court adopted (the Council's proposal). He also did not favor any change which would allow or encourage destruction of evidence. CEOs of really big companies were pushing for adoption of a discovery rule that might allow for such destruction. Thus the preservation section that allowed for such destruction was stricken at the Senate level.

The Senator thanked the Council. He said that what he saw from this Council was "integrity."

Mr. Gleisner noted that both the Senator and Representative Ott attend Council meetings religiously and always contribute a great deal to each Council meeting. Mr. Gleisner further noted that he sat through the Assembly Committee hearing (lasting 5 hours) and the Senate Judiciary Committee hearing (lasting 6 hours) and he was very impressed with the fair and professional manner in which Senator Wanggaard and Representative Ott conducted those hearings.

Mr. Orton noted that while the Legislature has now adopted some form of federal rules 31, 34, etc. but the Legislature has not adopted all of the federal rules that precede those rules, like, for example, Federal Rule 26, which deals with mandatory initial disclosures of evidence, a provision that can reduce the need to conduct further discovery in many areas.

Mr. Orton pointed out that only 6% of cases filed in the state courts are tort cases, but 43% are family law and divorce cases. In Mr. Orton's office, there are 159 interrogatories filed per divorce case, and the standard number from the other side in divorce cases is the same. Mr. Orton doesn't think that individual courts could modify the limitations on numbers of interrogatories or depositions by local rules; at least that could cause problems. Mr. Orton suggested that perhaps this new legislation should be referred to the Evidence & Civil Procedure Committee to study whether some of the other federal rules (like Rule 26) should be adopted to supplement the newly adopted legislation. Or, because the Legislature has spoken, is it wrong for us to take that up until problems present themselves later on down the road?

Mr. Gleisner replied that we should wait for there to be a problem, unless the Legislature asks us to do something. He expressed the belief that depending on the facts of a particular case a court could grant leave for more interrogatories or depositions.

Judge Gasiorkiewicz addressed the limitation on interrogatories and depositions and expressed the view that those limitations may well increase the burden on overworked circuit courts which will now have to adjudicate disputes regarding the enlargement of those limitations. The Judge thinks that this is a perfect situation for the Council to offer suggestions to the Legislature without waiting until a problem develops.

Mr. Orton added that a referral would not mean that any kind of immediate action could be anticipated. If a question were referred to the Evidence & Civil Procedure Committee it could be months or longer before any recommendations would be forthcoming.

Tom Shriner said that there was no disrespect intended to the Legislature, but he doesn't think it was an accident that the new legislation was introduced during the holidays. This is often how the Legislature works, however, and in doing this quickly as was done here the Legislature left some things out, and we have a right to discuss what was left out as a way of trying to improve the legislation. It would not be disrespectful to go through what the Legislature did, not to undo it, but to see if there are some constructive suggestions that could be made as to how the legislation could be complemented and made better.

Mr. Gleisner commented that when the Legislature has acted in an area covered by Wis. Stat. §751.12, just like with the Supreme Court, we should only act if the Legislature asks us to act.

Senator Wanggaard says he wants to hear from the Council. If the Council sees something that the Legislature should be concerned about, the Council should say something; that's what this body does. He would rather be proactive and look ahead than wait for a problem to cause trouble. Better to tweak something before all kinds of other issues arise. He pointed out that the Legislature does trailer bills all the time. And if it's something more major, like adopting all of Rule 26, then the sooner we start looking at it the better. He would rather be ahead of the game than try to play catch-up. Above all, he wants the new legislation to be fair.

Representative Ott agreed with all that the Senator said, and stated that he considers the Judicial Council to be a wonderful resource. From his standpoint, he has often come to the Council for feedback on issues like drunk driving penalties and bail. He is always happy to hear from the Council and an example of how well that can work is the structured settlement law that started in the Council. He thinks that the Council's relationship with the Legislature is beneficial to everybody.

In view of the remarks of the Chairs of the Senate and Assembly Judiciary Committees, MOTION: Mr. Gleisner moved that the Council refer to the Evidence & Civil Procedure Committee, a study of the newly enacted legislation and provide feedback to the Council for the purposes of supplying to the Legislature any thoughts of the Council as to how that legislation may be improved. Second by Dennis Myers. There was agreement that the motion should cover all possible applicable federal rules, such as Federal Rules 16 and 26.

The motion passed unanimously, with Senator Wanggaard, Representative Ott and Sarah Barber all abstaining.

**Agenda Item IV: Report by Judge Gasiorkiewicz concerning Judge Neubauer's appointment and timing of a Court of Appeals replacement for Judge Blanchard.**

Judge Gasiorkiewicz got in contact with Chief Judge Neubauer, who has reported that it is her intention to appoint Judge Michael Fitzpatrick to the Council as the Court of Appeals appointee. Judge Fitzpatrick has agreed, but cannot begin until November of this year.

**Agenda Item V: Discussion and/or action regarding the State Law Library's transfer of the old Council's office's content to the State Law Library. Report by Gleisner concerning**

**messages exchanged with the State Law Library's webmaster regarding the transfer of the Council's site files to [www.wilawlibrary.gov/fudcoun](http://www.wilawlibrary.gov/fudcoun).**

Mr. Gleisner deferred to Julie Tessmer of the State Law Library, who addressed the Council. Julie passed out a memorandum dated March 22, 2018. According to Ms. Tessmer, The State Law Library staff was able to move all the materials from the old Council office to the Library, and they are accessible by Council members if necessary. Over the next several months, those materials will be categorized, indexed and added to the Council's permanent archival collection of Council materials. All subscriptions to books in the Council's old office were cancelled through DOA. The Council's existing website has been moved over to the Law Library's website and is now accessible to the public there. Anybody who has the old site bookmarked will be redirected to the new site. Ms. Tessmer has requested a meeting with the State Historical Society archivist to discuss housing all of the Council materials at the State Law Library. Ms. Tessmer asked that we update email addresses, members, etc., in order to keep the website current. Ms. Tessmer extended an invitation to Council members to visit the Council's collection at the Library.

Mr. Shriner told Ms. Tessmer that he and Senator Wanggaard are on the Board of the Historical Society and would be available to help with any issues of coordination between the Society and the Library.

**Agenda Item VI: Discussion and/or action regarding creation of Council email address and P.O. Box.**

Mr. Gleisner reported that he is in the process of acquiring those items. Ms. Tessmer confirmed that the URL of a new email account can be set up on the Council's website to which people can send messages. She recommended a premium account to assure transfers of data can be accommodated.

**Agenda Item VII: Discussion and/or Action Regarding the Finalized Petition to the Supreme Court for an Order Amending Wis. Stat. §806.02 (default judgments), together with the finalized Memorandum in Support of that Petition.**

Mr. Shriner noted that the draft petition and memorandum was distributed with the materials for this meeting, which is the culmination of work by the Evidence & Civil Procedure Committee. MOTION: Mr. Gleisner moved that the Council approve the petition and memorandum, with the proviso that Mr. Shriner shall have the right to correct any scrivener errors in the drafts, and thereafter sign and file the petition and memorandum with the Supreme Court. Mr. Orton seconded the motion. Ms. Barber called attention to certain errors in the petition and memo. She also suggested that they not speak in terms of "repeal and recreate," but instead speak in terms of "amend." That was agreed to by Mr. Shriner.

The motion passed unanimously, with Sen. Wanggaard, Rep. Ott and Ms. Barber abstaining..

**Agenda Item VIII: Discussion of draft from Attorney Shriner regarding possible Judicial Council recommendation that the Legislature repeal Wis. Stat. §887.015 and adopt the UDAA to replace it (see LRB-3993/PI).**

Mr. Shriner discussed his draft of a piece of proposed legislation (the draft has not yet been reviewed by the Evidence & Civil Procedure Committee) regarding a proposed repeal of Wis. Stat. §887.015 and a replacement with LRB 3993/PI. We have a statute now that allows someone located overseas to sign a declaration without notarization, but which will be treated in the courts of Wisconsin as a sworn statement. Such a declaration is made under penalty of false swearing. What the committee's proposal would do is make this procedure applicable to a statement made anywhere in the world, which means adopting the uniform provision set forth in LRB-3993/PI. Mr. Shriner asked Senator Wanggaard when it would be appropriate to finish such a proposal to his Senate Committee, and the Senator said "anytime; we're not closed over the summer."

**Agenda Item IX: Discussion of the concept of the Open Meeting Law generally and the concept of a "walking quorum" by reference to a new Court of Appeals decision, *State ex rel. Zecchino v. Dane County*, 2018 WL 1097026, 2018 Wis. App. Lexis 231 (decided February 27, 2018).**

Gleisner stated that the Council takes the subject of the Open Meeting Law very seriously, and suggested that all members of the Council should read this case. However, the point of the *Zecchino* case is that communicating with members for scheduling meetings, distributing information, etc. is not a problem. This law only becomes a problem when the Council or its committees make a decision.

**Agenda Item X: Discussion and/or status report concerning Judge VanDeHey's proposed correction of Wis. Stat. §893.783, thus supplying an Inadvertently deleted venue provision regarding prisoner actions.**

Judge VanDeHey stated that the "save the children bill" will be discussed on April 12 at the Appellate Committee and the venue problem has been corrected.

**Agenda Item XI: Report of the Council's Nominating Committee regarding a replacement for Judge Blanchard as Vice Chair of the Council, and appropriate Action regarding same.**

Upon the recommendation of the Nominating Committee, Mr. Gleisner was elected Vice Chair of the Council.

**Agenda Item XII: Adjournment.**

The meeting adjourned by consensus at approximately 11:30 a.m.