



STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN April 20, 2018

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

MEMBERS PRESENT: Chair Thomas W. Bertz (by phone); Sarah Walkenhorst Barber; Diane Fremgen; Judge Eugene A. Gasiorkiewicz; William C. Gleisner; Christian Gossett; Duane Harlow; Devon Lee; Dennis Myers; Judge Scott Needham; John R. Orton; Representative Ott; Thomas L. Shriner; Steven Wright; Senator Van H. Wanggaard (by phone); and Judge Jeffrey Wagner (by phone).

MEMBERS EXCUSED: Justice Annette Kingsland Ziegler; Sherry Coley; and Judge Robert VanDeHey.

OTHERS PRESENT: Julie Tessmer, State Law Library; Lynn Davis, State Bar.

Agenda Item I. Roll Call and approval of the Minutes of March 23, 2018.

Roll call was taken and the March 23, 2018 Minutes were approved unanimously.

Agenda Item II: While discussions concerning the new law created by AB 773 and Senate Bill 645 (Wisconsin Act 235) have been referred to the Evidence & Civil Procedure Committee, for informational purposes only the membership is being supplied with a final draft of Wisconsin Act 235. No action will be taken on this at the meeting, but Tom Shriner will answer any questions regarding the referral to the Evidence & Civil Procedure Committee during his Committee Report.

According to Mr. Shriner, pursuant to the direction of the Council at the last meeting, the Evidence & Civil Procedure Committee will prepare a plan for reviewing Wisconsin Act 235 to determine if there are any improvements that might be made to Act 235, or any additions derived from the Federal Rules of Civil Procedure that could be added to Act 235 to make it more workable. It is the intention that any suggestions for improvements or adoptions from the Federal Rules will be directed to the Legislature for its consideration.

Bill Gleisner pointed out that it was not the intention of the Council or the Committee that changes can or should be made to Act 235. The only intention was to see if improvements could be made to make Act 235 more workable. Senator Van Wanggaard and Representative Jim Ott agreed that was their understanding of why Act 235 was referred to the Evidence & Civil Procedure Committee for its review.

Agenda Item III: Discussion and update regarding the State Law Library's continued work to facilitate the smooth continuation of the work of the Judicial Council. Report by Mr. Gleisner concerning the Council's new P.O. and email addresses.

Mr. Gleisner reported on some of the things that have been done since the last meeting. We now have post office address for the Council, P.O. Box 1001, Brookfield, WI 53008 and that was done for the convenience of Gleisner in checking for mail sent to the Council.

Mr. Shriner pointed out that we don't have a budget or funding and that is why a Council P.O. address has been located in Brookfield. Mr. Shriner also stated that a problem for the Council going forward is how the Council will contact stakeholders about matters under consideration. Without a budget, it may not be workable to send mailings to stakeholders. Instead, we may need to rely on email lists of stakeholders. Mr. Shriner also pointed out that we may be able to solicit help from the State Bar in contacting interested stakeholders.

Mr. Gleisner stated that in addition the Council now has a new email address, and Mr. Gleisner noted that he and Mr. Shriner will have keys to our mailbox at the Brookfield post office, and Mr. Shriner also has the passcode to the Council's new email address:
wi.judicialcouncil@gmail.com.

Julie Tessmer of the State Law Library was asked to speak. She distributed a memo which she then discussed. She reported that the website of the Council has been updated by adding the corrected telephone number (414-651-3182), the email address (wi.judicialcouncil@gmail.com) and revisions to the membership, etc. The Council's new website is now part of the State Law Library site and is located at: <http://wilawlibrary.gov/judicialcouncil/index.htm>. If you are at the site and find anything you think needs updating, just let her know. Mr. Gleisner informed Ms. Tessmer that the Council Executive Committee will meet to set up new dates for next year's Council meetings. Mr. Shriner stated that proposed meeting dates for next year will be presented to the Council for consideration at the June meeting.

Mr. Shriner noted that for calendaring purposes everyone should be aware that we always meet on the third Friday of every month, except July and August, making allowances for special circumstances like Thanksgiving, Christmas or Easter, etc., and make those available to the State Library's webmaster probably following the June 15, 2018 meeting. Mr. Gleisner also stated that missing minutes will be supplied over the summer. It will be necessary to confer with Duane Harlow as to how we treat the the minutes of the closed meetings held during 2017. Mr. Harlow stated that he is not the expert on closed meetings but he would get the answer on how to handle any minutes from closed meetings.

Judge Eugene Gasiorkiewicz suggested that we need to enlist the State Bar to get our email and snail mail addresses out to the Bar membership. Mr. Shriner agreed and said that we need to do more generally to reach out to the Bar, when it comes to asking for suggestions regarding Act 235, and going forward for suggestions as to projects that the Council and the Evidence & Civil Procedure Committee might undertake.

For example, the issue of overseas service of process is an area where other members of the Bar may have ideas that could help the Council refine the issues. Many times when issues seem arcane we have to realize that if we reach out we will find members of the Bar who view such issues as important and know something about them.

Mr. Gleisner made the suggestion that a project for the upcoming summer months would be to undertake an effort to reach out to major stakeholder organizations and make sure we have a solid email list available for use when we need to reach out.

Agenda Item IV: Discussion regarding the finalized Petition to the Supreme Court for an Order Amending Wis. Stat. §806.02 (default judgments), now filed with the Supreme Court as Petition 18-03. Copies of the Petition & Memo accompany this Agenda.

Mr. Shriner reported that this petition has just been filed and Supreme Court Commissioner Julie Rich has it in hand. Mr. Shriner reported that the way the Court does such things, this petition will be discussed at one of its future meetings this month or next and the Court will decide whether it wants to consider the petition. If so, then the Court will provide public notice for a public administrative hearing this coming Fall.

Agenda Item V: Discussion of Attorney Shriner's revised draft of a possible Judicial Council recommendation that the Legislature repeal Wis. Stat. §887.015 and adopt the UUDA to replace it. Mr. Shriner's recommendation accompanies this Agenda.

Mr. Shriner also addressed this, and began by pointing out that this recommendation is going to the Legislature instead of the Supreme Court. The document that was distributed is substantially the form in which we will submit this to the Legislature and will bear the general title: Recommendation by the Judicial Council to the Wisconsin Legislature. This document would ask the Legislature to repeal the current statute, which was based on a recommendation of the Council nine years ago, itself then based on a proposal of the Uniform Law Commission, only allowing the use of an unsworn statement in lieu of an affidavit when a declarant is located outside of the United States. The draft now before the Council would repeal that and replace it with a law (also based on a proposal of the Uniform Law Commission) that would allow an unsworn declaration in lieu of an affidavit to be used in court or agency proceedings in Wisconsin, regardless of where the declarant is located, in or out of the United States. This would eliminate the needless use of notaries to administer an oath. This puts the burden directly on the person making a declaration and informs him or her that a false declaration may subject the declarant to penalties for false swearing. This approach is more convenient and saves money.

John Orton asked if this would eliminate the need for all notaries, and Mr. Shriner answered that it does not. Notaries are still needed to administer many oaths (as an oath of office) or where they are used in the case of an acknowledgement. Mr. Shriner pointed out that this distinction is pretty clear from the Uniform Act itself. Mr. Gleisner asked if it would be useful to have a supporting memorandum, and Mr. Shriner said that is unnecessary because an LRB copy of the proposed Act will accompany the Council's recommendation.

The Council has already approved this action, so there is no need for a motion. This was just submitted for informational purposes.

Agenda Item VI: Planning for the June 15, 2018 annual breakfast and awards ceremony scheduled for June 15, 2018 in the Senate Parlor from 9:30 a.m. until 1 p.m. Please note that the Senate Parlor is being made available through the courtesies of Senator Wanggaard.

Mr. Gleisner noted that the Assembly Parlor is not available this year due to construction, but many thanks are due to Senator Van Wanggaard, who has made arrangements for us to use the

Senate Parlor for this year's awards breakfast. Mr. Gleisner again acknowledged the kind donations that have been made for an award plaque, including a donation today from Judge Scott Needham. Mr. Gleisner stated that the excess in that account will be available for expenses of the meeting.

Agenda Item VII: Updated Report by Gleisner regarding Awards for presentation at the June meeting of the Judicial Council in the Senate Parlor, including appointment of a "Breakfast and Awards" Committee

A "breakfast and awards" committee was set up consisting of Messrs. Shriner, Orton and Gleisner.

Agenda Item VIII: Reinvigoration of the Council's Committee system. Discussion of the importance of Committee work to the proper and productive functioning of the Council. At this meeting, it is asked that someone be present from the Council's three Committees to report on the following items:

A. Evidence & Civil Procedure Committee Report.

Mr. Shriner stated that there were a few things on this Committee's plate. For example, the Uniform Unsworn Declaration Act. We are going to review the implications of Act 235 and see if there are ways in which we might improve that Act. One way to possibly improve that Act is by adopting other parts of the Federal Rules of Civil Procedure, such as provisions that have not been adopted yet from FRCP 16 and 26. Mr. Gleisner pointed out that now state court judges will be faced with federal rules, but will lack the tools that federal judges have to fully implement the federal rules we have just adopted. A work plan will be established at today's meeting to conduct a thorough review of Act 235, with an eye to reporting back to the Judiciary Committees of the Senate and Assembly.

The Committee will continue to explore how best to deal with overseas service. Mr. Shriner understands that only Wisconsin and Michigan don't have a system to facilitate service of process overseas by mail. Otherwise, the Committee has completed a good deal of work recently, such as a complete review of our Rules of Evidence, as suggested by Professor Dan Blinka, and with his assistance.

Mr. Shriner returned to the different challenges faced by federal court judges and state court judges. As he noted, the federal system puts significant sums of money into operation of the federal judicial system, and thus federal judges have significant advantages over state court judges. It will thus be a problem to now saddle state court judges with the same rules as federal judges but without the tools provided to federal judges. Given Act 235, it is important for the Council to do what it can to even the playing field between the state and federal systems.

B. Appellate Procedure Committee Report.

Judge Robert VanDeHey reported that there are two projects that are still pending. Mr. Gleisner raised the point that Judge VanDeHey, current Chair of the Appellate Procedure Committee, has expressed a desire to leave the Appellate Procedure Committee and serve on the Criminal Procedure Committee. Further, Judge Michael Fitzpatrick, a former Council member as a circuit judge who now serves on the Court of Appeals, will be rejoining the Council early next year. Mr.

Gleisner then asked if there was anyone who would have an interest in joining the Appellate Committee, and Professor Wright volunteered.

Sarah Walkenhorst Barber stated that the Appellate Procedure Committee now meets in the office of the Clerk of the Court of Appeals. Tom Bertz reports that he has received a telephone call from Chief Judge Lisa Neubauer informing him of Judge Fitzpatrick's appointment to the Council and confirming that Judge Fitzpatrick cannot take an active role until November.

C. Criminal Procedure Committee Report.

Mr. Gleisner reported that Judge VanDeHey would prefer to be on the Criminal Procedure Committee. Mr. Harlow agreed to also serve on the Criminal Procedure Committee. It was suggested that Judge VanDeHey be appointed as Chair of this Committee, and Mr. Gleisner will inform him of that suggestion.

Mr. Gleisner observed that it is a good idea that a member of the Justice Department serve on each of the Council's Committees, and Mr. Harlow agreed.

D. PPAC Report.

No PPAC report was provided.

Agenda Item IX: Adjournment.

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