

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
June 18, 2010

The Judicial Council met at 9:30 a.m. in the Assembly Parlor, Second Floor West, State Capitol, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair Beth E. Hanan, Thomas W. Bertz, James C. Boll, Honorable Ann Walsh Bradley, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Rebecca St. John, Senator Lena Taylor, Honorable Mary K. Wagner, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Vice-Chair Marla J. Stephens, Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Professor Jay Grenig, Professor David E. Schultz, A. John Voelker.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney

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

Chair Hanan began the volunteer recognition portion of the meeting at 10:00 a.m. All guests were introduced and asked to make a few remarks. Visiting alumni commented on their years of service on the Council. Special thanks was extended to the State Law Library and the State Bar for their continued support. Plaques were presented to out-going Council members.

The business portion of the meeting was called to order at 10:45 a.m.

**II. Approval of May 21, 2010 Minutes**

MOTION: Council member Bertz moved, seconded by Council member Taylor, to approve the minutes. Motion approved unanimously.

**III. Approval of 2010-2011 Meeting Dates**

The following 2010-2011 meeting dates were proposed:

Friday, September 17, 2010  
Friday, October 15, 2010  
Friday, November 19, 2010  
Friday, December 17, 2010  
Friday, January 21, 2011  
Friday, February 18, 2011  
Friday, March 18, 2011  
Friday, April 15, 2011  
Friday, May 20, 2011

Friday, June 17, 2011

Council member Taylor suggested that the Council consider changing the venue from the State Capitol to other locations around the state for one or two meetings during the up-coming year. She stated that in her experience, communities around the state have been very receptive to hosting government meetings that are traditionally held in Madison. The Council discussed meeting at Marquette University and the University of Wisconsin Law Schools and inviting law students to attend. The Council was generally interested in exploring the idea of holding meetings at other venues, but several members expressed concern about the logistics of planning the meetings, additional costs that may be involved, and the best use of the Council's resources. Several Council members offered assistance in finding a location and encouraging local residents or groups to attend. Council members also suggested that many locations allow government meetings to be conducted without charge for use of the facility. The Council generally agreed that certain projects such as the proposed amendments regarding presentence investigation reports will be of interest to legal professionals around the state, and may be a good topic to discuss at a meeting outside of Madison. Chair Hanan and Attorney Southwick will obtain additional information regarding alternative meeting locations and report back to the Council at its next meeting.

**MOTION:** Council member Wagner moved, seconded by Council member Miller, to approve the meeting dates as proposed. Motion approved unanimously.

#### **IV. Election of 2010-11 Chair and Vice Chair**

At the previous meeting, Vice-Chair Stephens reported on behalf of the nominating committee consisting of Council members Grenig, Taylor and Stephens. The committee nominated Beth Hanan to continue as chair and Prof. David Schultz to serve as vice-chair of the Council.

**MOTION:** Council member Taylor moved, seconded by Council member La Fleur, to adopt the recommendation of the nominating committee, and appoint Beth Hanan as the chair and David Schultz as the vice-chair of the Judicial Council for the 2010-2011 Council year. Motion unanimously approved.

#### **V. Discussion and/or Action Regarding Amended Petition Regarding Discovery of Electronically Stored Information (No. 09-01)**

At an open administrative conference on April 28, 2010, the supreme court voted to adopt the Judicial Council's amended petition (No. 09-01) to create and amend statutes relating to the discovery of electronically stored information, effective January 1, 2011. The Council's amended petition provided for a discretionary discovery conference. At the administrative conference, the court amended the provision to require that the parties confer in all cases involving discovery of electronically stored information. Council member Leineweber explained that the court has invited the Judicial Council to propose specific language for the amendment. The court would like to select the amended language by June 30, 2010. At the previous Council

meeting, the Evidence & Civil Procedure Committee was asked to discuss the provision regarding mandatory discovery conferences and make a recommendation to the full Council.

At its previous meeting, the Evidence & Civil Procedure Committee discussed two mandatory discovery conference proposals drafted by court staff. The committee agreed by consensus to recommend that the Council send a letter to the court stating that the Judicial Council continues to support its original recommendation for a discretionary discovery conference as described in s. 804.01 (4m) of its amended petition. The committee declined to draft additional mandatory language, and agreed that if it must select from the alternative language proposals under consideration by the court, the committee feels that option I is preferable. The committee asked Attorney Southwick to draft a letter for review by the full Council at its next meeting. Attorney Southwick drafted a letter reflecting the committee's recommendation, and distributed it to Council members for review prior to the meeting.

Council member Leineweber also reminded the Council that both the Evidence & Civil Procedure Committee and the full Judicial Council have previously discussed and rejected mandatory discovery conferences. He also stated that because the vast majority of discoverable information is now generated electronically, the amendment proposed by the supreme court could extend the mandatory discovery conference requirement to virtually all discovery. The Council again reviewed and discussed the two versions of draft language prepared by the court to amend the provision regarding discovery conferences.

**MOTION:** Council member Leineweber moved, seconded by Council member Taylor, to adopt the recommendation of the Evidence & Civil Procedure Committee and authorize Attorney Southwick to send the draft letter, dated June 18, 2010. Motion unanimously approved, with Council member Bradley abstaining.

Several Council members reported that initial feedback from circuit court judges indicates that they are generally opposed to a mandatory discovery conference provision. Council members discussed whether they should encourage circuit court judges to submit written and/or oral comments to the supreme court in the fall. The Council also discussed its continuing role with regard to rules regarding discovery of electronically stored information, and in particular, its role at the public hearing to be held before the supreme court in the fall. Chair Hanan directed the Evidence & Civil Procedure Committee to give further consideration to these issues and make a recommendation to the full Council.

**VI. Discussion and/or Action Regarding Wisconsin Rules of Evidence**  
**A. "Other Acts" Rule, Wis. Stat. § 904.04**

Council member Leineweber reported that the Evidence & Civil Procedure Committee had extensive discussions regarding amending the "other acts" rule, Wis. Stat. § 904.04 (2) to include codification of the factors in *State v. Sullivan*, 216 Wis. 2d 768 (1998), and a pretrial notice provision. Discussions included participation from guest speakers Assistant Attorney General Greg Weber and Marquette University Professor Daniel Blinka. The committee ultimately concluded that the problem appears to be in the application of the *Sullivan* factors and codification would probably not advance the law. Therefore, the committee recommended

taking no action. However, it was agreed that additional judicial education regarding the application of the *Sullivan* factors may be beneficial. Assistant Attorney General Weber volunteered to discuss the educational aspect with David Hass, Director of the Office of Judicial Education.

The Council agreed by consensus to take no further action with regard to the “other acts” rule, Wis. Stat. § 904.04 (2).

## **VII. Committee Reports**

### **A. Appellate Procedure**

Committee member St. John reported that the Appellate Procedure Committee continues to work on a memorandum to the Council explaining the presentence investigation report project, and the committee’s recommended statutory amendments. Committee member feedback on the memo is due to Attorney Southwick by June 30, 2010. The committee intends to provide the memorandum and proposed amendments to the full Council for discussion at its September meeting.

### **B. Criminal Procedure**

There was no Criminal Procedure Committee report.

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

Committee chair Leineweber reported that the Evidence & Civil Procedure Committee met on May 21 to discuss discovery conferences (see item V, above), and continue its review of the rules of evidence. At today’s meeting, the committee will continue to discuss character for truthfulness, Wis. Stat. § 906.08, and records of regularly conducted activity, Wis. Stat. § 908.03 (6).

## **VIII. Other Business**

### **A. PPAC Liaison’s Report**

There was no PPAC Report.

### **B. Assembly Judiciary Committee Report**

Because Council member Hebl had to leave the meeting early, Chair Hanan reported that Council member Stephens volunteered to serve on the Legislative Council study committee regarding judicial discipline and recusal. Chair Hanan also explained that Council member Hebl has asked the Council to study a recent court of appeals opinion, *Palisades v. Kalal*, which involved the application of an evidentiary rule. Chair Hanan referred the issue to the Evidence & Civil Procedure Committee for discussion in conjunction with the rules of evidence, in particular the rule regarding records of regularly conducted activity, Wis. Stat. § 908.03 (6).

### **C. Senate Judiciary Committee Report**

Council member Taylor reported that the Legislative Council has formed a study committee on criminal justice funding and strategy and she will serve as chair. Council member Stephens has also volunteered to serve on the committee. Council member Taylor also highlighted a number of issues on the legislative agenda for the up-coming year, including mental health issues, juvenile justice system, bail and pretrial release, and parenting plans and maximization of placement.

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

Attorney Southwick reported that a request for assistance was received from a graduate student seeking the Council's assistance with a survey of circuit court judges regarding sentencing decisions. Although the request is outside the Council's statutory authority, Attorney Southwick asked for suggestions from Council members regarding sources that may be able to assist the student. Several members suggested that the student contact the Department of Corrections because it maintains extensive records regarding sentencing.

Attorney Southwick congratulated Council member Wagner on her reappointment as Chief Judge.

Attorney Southwick thanked Council members Leineweber and Grenig, and Committee members Gleisner and Sankovitz for taking part in a June 9<sup>th</sup> continuing legal education webcast for the State Bar regarding the new discovery rules.

June 30 marks the end of the Council's fiscal year, so all outstanding travel vouchers must be submitted for payment.

## **VI. Adjournment**

Chair Hanan will provide the supreme court with an informational letter explaining the Council's internal processes in researching, developing and submitting rule change petitions.

The Council's next meeting is September 17, 2010.

The Council adjourned by consensus at 11:45 a.m.