

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
June 20, 2014

The Judicial Council met at 9:30 a.m. in the 412 East, State Capitol, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, George Burnett, Hon. Michael Fitzpatrick, William Gleisner, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Honorable Jeffrey A. Wagner, Greg M. Weber, Honorable Maxine A. White, Amy E. Wochos.

**MEMBERS EXCUSED:** Senator Glenn Grothman, Tracy K. Kuczenski, Devon M. Lee, Benjamin J. Pliskie, A. John Voelker.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Hon. David Prosser, Supreme Court; Hon. Ann Walsh Bradley, Supreme Court; Hon. Shirley Abrahamson, Supreme Court; Sandy Lonergan, State Bar; Nancy Rottier, Director of State Court's Office; Matt Frank; Ralph Cagle, State Bar President-Elect; Jill Kastner, State Bar; Jenny Krueger, Appellate Procedure Committee; Katie Koschnick, Governor's office; Hon. Earl Schmidt; Hon. Raymond Gieringer; Gwen Wortock; Donna Shriner.

**I. Introduction of Guests, Volunteer Recognition and Discussion Regarding Council Projects**

Chair Bertz began the volunteer recognition portion of the meeting at 10:00 a.m. Guests introduced themselves. Chair Bertz and Attorney Southwick presented plaques to out-going Council members. Attorney Southwick provided an update on the status of the Council's current projects and extended appreciation to the Council's many volunteers for their excellent service.

**II. Call to Order and Roll Call**

Chair Bertz called the meeting to order at 10:25 a.m.

**III. Approval of May 16, 2014 Minutes**

MOTION: Council member Wagner moved, seconded by Council member Myers, to approve the May 16, 2014 minutes. The minutes were approved unanimously without amendment.

**IV. Election of 2014-15 Chair and Vice Chair**

Chair Bertz previously appointed Council members Wagner, Gleisner and Myers to serve on the nominating committee and asked Council member Wagner to chair the committee. Council member Wagner reported that the committee nominated Tom Bertz to serve as chair and Judge Brian Blanchard to serve as vice chair of the Council for the 2014-2015 Council year. There were no additional nominations from the floor.

MOTION: Council member Shriner moved, seconded by Council member Ptacek, to accept the nominating committee's recommendation for chair and vice chair. Motion approved unanimously.

#### **V. Approval of 2014-2015 Meeting Dates**

The Council has historically met on the third Friday of each month from September through June. Attorney Southwick noted a typographical error on the proposed dates that were circulated in advance of the meeting. The proposed September meeting date should be the 19<sup>th</sup>, not the 21<sup>st</sup>.

Members discussed potential conflicts with the dates on the proposed 2014-2015 meeting schedule. The proposed November meeting date conflicts with the Judicial Conference. Members discussed canceling the November meeting and moving the December meeting up a week. Attorney Southwick noted that the final meeting on the schedule conflicts with Juneteenth. Members generally agreed that the Council's meeting time does not conflict with the usual times when Juneteenth celebrations are scheduled.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to accept the proposed 2014-2015 meeting schedule modified to reflect no Council meetings in November 2014, and the December meeting date changed to December 12, 2014. Motion approved unanimously. Attorney Southwick will circulate an updated meeting schedule to members.

The approved meeting schedule is as follows:

Friday, September 19, 2014  
Friday, October 17 2014  
Friday, December 12, 2014  
Friday, January 16, 2015  
Friday, February 20, 2015  
Friday, March 20, 2015  
Friday, April 17, 2015  
Friday, May 15, 2015  
Friday, June 19, 2015

#### **VI. Discussion/Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure**

Vice Chair Blanchard, who also chairs the Criminal Procedure Committee, reported that the Criminal Procedure Committee held a meeting on June 17, 2014 that focused on preliminary examinations and included a public hearing. Although AB 383 recommends elimination of preliminary examinations, the committee ultimately agreed to recommend retention of current law. The committee's next meeting will focus on the proposed amendments to the discovery statutes and will include a public hearing.

Attorney Southwick reported that all sixteen members of the Criminal Procedure Committee attended the six-hour hearing and meeting on June 17, 2014, and she expressed appreciation for their commitment to the work of the committee.

While the committee agreed to recommend retention of current law regarding preliminary examinations, members also recommended unanimously that the Council task the committee with conducting a study of current law and making recommendations regarding potential improvements. Vice Chair Blanchard clarified that the committee does not intend to recommend amendments for inclusion in the criminal procedure bill. The proposed study would be an in-depth project to explore how technology can be used to improve the current process. Any recommendations would likely take the form of a stand-alone bill to be introduced in the future. Council member White inquired as to whether the study would involve any additional cost paid by the Council. Attorney Southwick responded in the negative. The Council agreed by consensus to accept the project for further study and recommendation by the Criminal Procedure Committee.

Attorney Southwick explained that the recommended change to retain current law regarding preliminary examinations will require extensive amendments to AB 383. She noted that although the Council has not officially received the committee's final recommendations yet, she would like Council approval to ask the Legislative Reference Bureau (LRB) to begin redrafting the bill to make the necessary amendments to retain current law regarding preliminary examinations. She noted that it could be a time consuming process and the LRB drafters will likely have questions that may require the Council's response. She suggested that LRB begin the process now to improve the likelihood that the Council will complete the bill for reintroduction in January 2015.

In conjunction with recommending retention of current law regarding preliminary examinations, the committee also recommended deletion of proposed section 971.69 of AB 383, which created a motion procedure to request pretrial dismissal of the complaint.

**MOTION:** Council member Ptacek moved, seconded by Council member Myers, to approve the Criminal Procedure Committee's recommendation to retain current law regarding preliminary examinations. Following further discussion, this motion was withdrawn.

Council member Shriner noted that the Council previously voted to support the elimination of preliminary hearings and he has not heard sufficient information to justify changing that position. He also opposed the change because it would remove a provision in AB 383 that is likely to provide significant cost savings. Attorney Southwick stated that in addition to considerable discussion and debate by the Criminal Procedure Committee members, the recommendation to retain preliminary examinations is also based on the testimony the committee received from nine different speakers at a three-hour public hearing. Council member Schimel, who serves on the Criminal Procedure Committee, added that no organization or speaker spoke in support of eliminating preliminary examinations.

Council member White voiced her strong disapproval of the actions of stakeholders who declined to participate in the work of drafting the bill, failed to provide comments to the Judicial Council prior to the introduction of the bill, or failed to appear at either of the public hearings

that were held by the Judiciary committee, but have now come forward demanding changes. She suggested that their actions have wasted valuable and limited Council resources.

The Council discussed the procedure that should be used if the Council decides to make changes to AB 383, noting that this is an unusual situation because the bill was previously recommended and approved by the Council. Attorney Southwick explained that she could request that the LRB revise the bill to make the changes recommended by the committee prior to the Council approving the changes. She brought the matter to the Council for approval simply to avert any potential confusion or misunderstanding. She clarified that the revisions would be a draft subject to further consideration, and possibly additional amendments, by the Council. Draft revisions have been requested numerous times over the course of the project and they have been subject to review, further revision, and/or approval by the Council. She also noted that redrafting requests to the LRB usually result in many questions from the LRB drafter and she emphasized that the process should begin soon so that the bill can remain on track for introduction in January.

Council member Fitzpatrick asked when the Criminal Procedure Committee intends to bring all of its recommendations to the Council. Vice Chair Blanchard stated that the committee's goal is to complete its work by its September 9, 2014 meeting to allow the full Council to review its recommendations at the September 19, 2014 meeting. Attorney Southwick distribute the recommendations as quickly as possible following the committee's September 9th meeting.

**MOTION:** Council member Ptacek moved, seconded by Council member Myers, based on the recommendation of the committee and subject to final approval by the full Council, to request that the Legislative Reference Bureau prepare a revised bill retaining current law regarding preliminary examinations. Council member Gleisner expressed his opinion that the Council should not do any redrafting until members receive the committee's final recommendations. Council member Roggensack inquired as to whether LRB retains different versions of the bill. Attorney Southwick responded in the affirmative and explained that LRB numbers each draft, so if the Council ultimately declines to make the change regarding preliminary examinations, LRB will still have AB 383 as it is currently drafted. Motion approved with Council member Gleisner opposed and Council member Ott abstaining.

## **VII. Discussion/Action Regarding Judicial Council's 2015-2017 Budget Request and Budget Procedure**

The Council continued discussing its 2015-17 budget request. Prior to the meeting, Attorney Southwick distributed a document containing the Council's operating budget and actual expenditures for the two previous fiscal years. She noted that during the two previous fiscal years the Council has received funding from the court to cover half of the Council's expenses for salary and fringe benefit, although the court has been unable to provide funding for supplies and services.

At the previous meeting, Attorney Southwick explained that the Council's two aging computers will need to be replaced, but the Council does not have sufficient funding to allocate

funds for technology improvements in its operating budget. If full funding is restored during the next budget, there will be sufficient money to replace the aging technology.

Attorney Southwick explained that one of the Council's biggest expenses is travel reimbursements for its members. The total amount of funds required for travel reimbursements can vary greatly from year to year. It depends on factors such as the distance that members travel, how many Council and committee meetings are scheduled, and how many members request reimbursements. In the current fiscal year, the Council canceled two meetings so there are additional funds remaining in the operating budget for travel reimbursement. She asked members whether they would like her to try to use the remaining funds to upgrade the Council's desktop computer and upgrade to a current version of Microsoft Office at a total cost of \$943.00. She noted that any funds remaining in the budget will be lapsed at the end of the fiscal year.

MOTION: Council member Roggensack moved, seconded by Council member Ptacek, to authorize the expenditure of \$943.00 for technology upgrades if sufficient funds remain in the operating budget. Motion approved unanimously.

Council member Roggensack expressed her concern that a biennial budget request seeking restoration of full funding (\$58,000) is actually an increase in funding because it exceeds the amount the court is currently contributing (\$46,114) to the Council's funding. Attorney Southwick explained that the court is also reimbursing the travel expenses for the four members appointed by the Judicial Conference. The travel expenses (estimated at up to \$3,500/annually) are paid directly by the court, so they are not included in the \$46,114 allocation to the Council. The full funding of \$58,000 represents the actual amount that the court is currently authorized to provide to the Council. Unfortunately, the Director of State Courts has not been able to transfer the full amount to the Judicial Council. As a result, the Council has had to significantly reduce or eliminate its expenditures for items such as research material, office supplies, technology, and travel reimbursements. While the Council was able to make these reductions on a temporary basis, it cannot continue to operate at this reduced funding level. As the Council discussed at its previous meeting, its computer system is running on an operating system that is no longer supported and must be upgraded. Basic software is out-dated, making it difficult to open documents created on software that is more current. The Council's current level of funding is not sufficient to continue to cover basic expenses needed for the operation of an office, such as office supplies, toner for the printer, and maintenance for the copier.

Attorney Southwick noted that travel reimbursements represent one of the largest expenses for the Council. At the current reduced funding level, the Council and its committees are limited in the number of meetings that can hold each year, which could delay the Council's work. The Council has also been forced to eliminate travel reimbursement (mileage and parking) for ad hoc members who volunteer on the Council's various standing committees. Most current ad hoc members have graciously agreed to continue to participate at their own expense, but this policy change makes it more difficult to retain current volunteers and attract new volunteers from areas outside of Madison.

Attorney Southwick explained that she was able to further reduce the Council's expenses during the current fiscal year by renegotiating the lease terms for the Council's office during a

short-term renewal period, but that period is ending. She will be required to negotiate a new lease and she anticipates that the Council's office rent will increase under the new lease.

Chair Bertz asked Attorney Southwick for a recommendation regarding the budget. Attorney Southwick stated that she agrees with Council member Roggensack's suggestion to seek restoration of the Council's funding at a reduced level. She suggested that the Council approve the submission of a zero-growth budget with a request to transfer \$46,114 from PR funding to GPR funding.

Council member Roggensack suggested seeking an extension of the September 15, 2014 deadline to submit the Council's budget, so that the full Council can review the final submission at its September 19, 2014 meeting. Attorney Southwick explained that the Council has several options for approval of the budget. It can assume that DOA will grant an extension and allow the Council to submit its budget after its September 19, 2014 meeting; it can reschedule the September 19th meeting to September 12th; or it can authorize its Executive Committee to approve the budget request for submission on September 15th, pending final approval by the Council at the September 19th meeting, as agreed to at the previous meeting. Attorney Southwick cautioned that an extension of the September 15, 2014 budget deadline might not be an option for the Judicial Council because that date is set by statute.

MOTION: Council member Fitzpatrick moved, seconded by Council member Gleisner to reaffirm the Council's previous decision to authorize the Executive Committee to approve the budget request for submission by September 15th, with ratification by the full Council at the September 19th meeting, if Attorney Southwick is unable to get an extension on the submission deadline. Motion approved unanimously.

Council member Burnett suggested that the Council could seek funding for capital expenditures such as a new computer from organizations such as the American Board of Trial Advocates or the State Bar. Chair Bertz questioned whether the Judicial Council is permitted to accept donations from private organizations.

The Council discussed the level of funding that should be requested in the 2015-17 budget. Council member White spoke in opposition to reducing the Council's budget request to reflect restoration of only \$46,114 in funding because that funding level is insufficient for the Council to continue to operate effectively. Attorney Southwick agreed that \$46,114 is insufficient, although she agreed that the Council can operate at a funding amount less than \$58,000. She suggested that a sufficient funding level likely lies midway between those two figures.

MOTION: Council member White moved, seconded by Council member Weber to authorize the Executive Committee to work with Attorney Southwick to determine the amount of funding to be requested in the 2015-17 budget. Motion approved unanimously.

### **VIII. Committee Reports**

## **A. Appellate Procedure**

Committee chair Ptacek reported that the committee continues to study Rule 809.15, the record on appeal. Members are focusing on issues such as supplementing the record, the clerk's discretion in determining the contents of the record, and transcripts for electronic exhibits and how to handle inaudible portions.

The committee also continues to work on the issue of prisoner challenges to agency decisions. The Legislative Reference Bureau has prepared a preliminary draft bill consolidating the rules into one subchapter of the code. The committee is discussing amendments to the draft bill, including revising the order in which information that is presented, more clearly defining "prisoner" for purposes of these provisions, and revising which documents must be submitted with the initial pleading.

## **B. Criminal Procedure**

There was no further report. Attorney Southwick announced that the committee will be holding a hearing on the discovery provisions in AB 383 on July 15, 2014 at 9:00 a.m. in Room 412 East, Capitol.

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

Committee Chair Shriner reported that the committee completed its study of Wis. Stat. § 885.205, privileged communications between students and deans and school psychologists. The committee concluded that the rule is generally unused and is not necessary, so the committee will recommend repeal of the rule. The committee continues to study *Alt v. Cline*, 224 Wis.2d 72, and whether to recommend codification of an expert privilege. The committee is also studying the issue of spoliation and preservation of evidence and monitoring a proposed amendment to federal Rule 37. The committee is also studying an amendment to Wisconsin's class action rule to bring it in line with its federal counterpart.

## **IX. Other Business**

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

There was no report.

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

Attorney Southwick reported that the Council's two pending supreme court rule change petitions (13-16 and 14-01) are scheduled for preliminary discussion at the court's administrative conference on June 25, 2014. No action is anticipated, but the court may schedule them for a public hearing at a future date.

## **X. Adjournment**

The Council adjourned by consensus at 11:40 a.m.