

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
June 24, 2016

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Sarah Walkenhorst Barber, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, J. Denis Moran, Dennis Myers, Honorable Gerald P. Ptacek, Thomas L. Shriner, Honorable Robert P. Van De Hey, Jeffrey A. Wagner, Greg M. Weber, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Devon M. Lee, Representative Jim Ott, Benjamin J. Pliskie, Chuck Stertz, Honorable Senator Van H. Wanggaard, Amy E. Wochos.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lisa Roys, George Brown, and Lynne Davis, Wisconsin State Bar; Scott Kelly, Sen. Wanggaard's office; Erika Strebel, Wisconsin Law Journal; William Walker, Director of State Courts Office; Gwen and Robert Wortock; Rebecca St. John; Hon. Earl Schmidt; Chief Justice Patience Roggensack; Justice Jon Wilcox (retired); Justice David Prosser; Justice Shirley Abrahamson; Kristina Martinez, State Law Library; Assistant Attorney General Rich Moriarty; Michael Celjak; Marisa Janssen, Winnebago County District Attorney's office; Gretchen Vining.

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

Attorney Southwick began the volunteer recognition portion of the meeting at approximately 10:00 a.m. Guests introduced themselves. Attorney Southwick presented a plaque to former Council member Brad Schimel, and recognized several guests who have announced their upcoming retirements, including Justice Prosser, Assistant Attorney General Rich Moriarty, and State Bar Director George Brown. Attorney Southwick provided an update on the Council's accomplishments over the past year and gave a report on the Council's current projects.

II. Call to Order, and Roll Call

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

III. Approval of May 20, 2016 Minutes

MOTION: Council member Ptacek moved, seconded by Council member Myers, to approve the May 20, 2016 meeting minutes as presented. Motion approved unanimously.

IV. Election of 2016-17 Chair and Vice Chair

Council members Gleisner, Lee, and Myers previously volunteered to serve on the nominating committee. The committee met on June 14, 2016 by telephone. Council member Gleisner reported that the committee unanimously nominated Tom Bertz to serve as chair and Judge Brian Blanchard to serve as vice chair of the Council for the 2016-2017 Council year.

There were no additional nominations from the floor.

ACTION: Members unanimously approved the nominating committee's recommendation for chair and vice chair, and commended both Chair Bertz and Vice Chair Blanchard on their past service.

V. Approval of 2016-2017 Meeting Dates

Prior to the meeting, Attorney Southwick circulated a list of proposed meeting dates. The committee discussed a possible conflict between the November meeting date and the annual Judicial Conference. Members agreed to strike that meeting date. The following dates were unanimously approved:

Friday, September 16, 2016
Friday, October 21, 2016
Friday, December 16, 2016
Friday, January 20, 2017
Friday, February 17, 2017
Friday, March 17, 2017
Friday, April 21, 2017
Friday, May 19, 2017
Friday, June 23, 2017

VI. Discussion and/or Action Regarding Judicial Council's 2017-2019 Budget Request

Prior to the meeting, Attorney Southwick circulated a memo regarding the 2015-2017 budget request. Council member Moran noted the increasing difficulty of remaining an independent state agency with only one employee.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to seek "realignment" in the 2017-2019 Judicial Council budget request by transferring the Judicial Council to the Director of State Courts office for purposes of funding and administrative services, and request that the Director submit a budget request seeking the same realignment. Under this request, the Council would no longer be an independent state agency, but its membership, powers, duties, and organization would remain unchanged. The Council's attorney would become an employee of the Director's office, but the Council would retain appointing authority. Motion approved unanimously.

The Council authorized Attorney Southwick to submit a status quo budget request, taking into account the standard budget adjustments that are calculated by the Department of Administration and incorporated into all agency budget requests.

VII. Discussion and/or Action Regarding Wis. Stat. § 885.03, Service of Subpoena

Council member Shriner addressed due process considerations for service of a subpoena. He noted that the cases that require actual notice arise in the context of service of a summons. Wisconsin rules provide a very elaborate method of service of summons. It is a three-step process, which includes: (1) personal service; (2) substituted service if, after reasonable diligence, personal service was unsuccessful; or (3) publication. Publication is used to toll the statute of limitations when both personal service and substituted service were unsuccessful.

In the context of service of a subpoena, the rules regarding contempt require that the witness be given an opportunity to explain why he or she did not appear. If the witness did not actually receive notice, then the witness will not be found in contempt. Council member Shriner suggested that on its face, the due process requirements for a subpoena are not as high as the due process requirements for a summons. However, he felt that the Council should consider recommending an amendment to the statute to require due diligence before using substituted service, at least in the civil context. He also suggested that perhaps the requirements for civil cases and criminal cases should be different. Council member Ptacek inquired about the issuance of a material witness warrant. Chair Shriner stated that his focus has been on the civil use of subpoenas, but he suggested the Council should study it in the context of criminal cases, as well.

Council member Shriner noted that Wis. Stat. § 801.11(1)(b) contains two methods for substitute service of a summons, but he noted that substitute service is only permitted at the defendant's abode. He suggested that the historical method was to leave a summons with a "competent member of the family at least 14 years of age..." A case involving a significant other who lived with the intended recipient of the summons resulted in an amendment to permit leaving it with "a competent adult, currently residing in the abode of the defendant..." Council member Shriner supported repealing the provision that permits leaving a summons with a family member at least 14 years of age and retaining only the provision that authorizes leaving the summons with a competent adult who resides with the defendant. He suggested that the same provision could be added to s. 885.03.

Council member Shriner also suggested that the reference to service of a subpoena in s. 805.07(5) should be amended to read, "A subpoena may be served in the manner provided in s. 885.03..." This amendment would delete the reference to substituted personal service as provided in s. 801.11(1)(b).

Finally, Council member Shriner proposed elimination of the "exhibit and read" option in s. 885.03(1). He suggested that no one uses that option anymore, so delivery of a copy of the subpoena should be the sole method of service.

Members discussed whether “adult” is defined in the statutes. Council member Shriner suggested that case law probably defines it, like many other provisions. For example, he cited to s. 801.11(5)(a) and its use of the phrase “person who is apparently in charge of the office.” Members also discussed the continued need for a provision authorizing service by publication.

Members discussed whether there should be different rules for criminal and civil cases. Council member Fitzpatrick suggested that the due process requirements are the same. He also suggested that regardless of the case type, improper service could result in delaying the case, which causes inefficiency for the courts. Members discussed the requirements for an attachment for a witness who fails to comply with a subpoena. Council member Gossett suggested that material witness warrants and service of subpoenas should be considered separately. Council member Stertz stated that in his experience, judges require proof of due diligence to obtain a material witness warrant.

Council member Weber suggested seeking more information from prosecutors. Attorney Southwick stated that the Council has requested input from the State Bar Criminal Law Section. Council member Weber expressed his opinion that the Criminal Law Section is comprised mostly of defense attorneys. Council member Stertz indicated that he is a member. Council member Weber suggested referring it to the Evidence & Civil Procedure Committee to seek input from WDAA and DOJ. Council member Gossett suggested that the issue should be referred to the Criminal Procedure Committee. Council member Shriner noted that the Evidence & Civil Procedure Committee has not been involved in matters concerning criminal procedure.

MOTION: Council member Weber moved, seconded by Council member Myers, to request that the Criminal Procedure Committee seek feedback from criminal law practitioners regarding s. 885.03. The committee was also asked to research the requirements for a material witness warrant. Motion approved unanimously.

VIII. Committee Reports

A. Appellate Procedure

Committee chair Ptacek referred to the report previously provided by Attorney Southwick during the volunteer recognition portion of the meeting. He observed that the committee has many pending projects. At today’s meeting, the committee will discuss feedback it received on proposed amendments regarding the record on appeal and the size and number of briefs in multiparty cases.

Council member Shriner suggested that the briefing rules in multiparty cases allow too many briefs and the rules are too complicated. He suggested that the Seventh Circuit Court of Appeals rule would be a better model. He spoke in support of the procedure that permits the clerk to designate which party is the appellant and which party is the appellee based on the notice of appeal and it sets up a three-brief schedule. This practice prevents the party raising only a minor issue from being designated as the appellant with the real issue raised in a cross-appeal. He offered to provide more information to the committee so that it can assess whether this issue should potentially be studied as a separate project. Members discussed whether a pre-submission

conference with a staff attorney might resolve this issue. Council member Ziegler suggested that the committee consult the supreme court commissioners, in addition to court of appeals staff attorneys, if they are going undertake a study of this issue.

B. Criminal Procedure

Committee chair Blanchard referred to the report previously provided by Attorney Southwick and had nothing further to add.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the court is expected to set the public hearing on the petitions proposing amendments to the rules of evidence at a date in October 2016.

The committee continues to work on a proposed amendment to the class action statute based on the federal model, and has completed a draft. The committee intends to circulate the draft to potentially interested parties for feedback over the summer. The committee will continue to work to harmonize the procedural provisions in the newly proposed rule with those found in current s. 426.110, consumer class actions.

IX. Other Business

A. PPAC Liaison's Report

Council member Moran reported that PPAC continues to work on the court's budget request.

B. Council Attorney's Report

Attorney Southwick thanked members for another successful Council year.

Council member Ptacek asked that the minutes reflect recognition of Attorney Southwick because she does an excellent job supporting the work of the Council. He commended her work effort and dedication to the Council.

X. Adjournment

The Council adjourned by consensus at approximately 10:45 a.m.