

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL
MADISON, WISCONSIN
September 21, 2007

The Judicial Council met at 9:30 a.m., Room 328 NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Marla J. Stephens, Chair; Honorable Ann Walsh Bradley, Michael R. Christopher, Allan M. Foeckler, Beth E. Hanan, Vice-Chair; Catherine A. LeFleur, Honorable Edward E. Leineweber, Honorable James Mason, Bruce Munson, Kathleen A. Pakes, Professor David E. Schultz, Senator Lena Taylor, A. John Voelker, Honorable Ted E. Wedemeyer, Jr.

MEMBERS EXCUSED: Kathleen E. Grant, Professor Jay Grenig, Representative Bill Kramer, Robert L. McCracken, Honorable Mary K. Wagner, Greg M. Weber (Kate Tripp from AG Office present), Honorable Maxine A. White.

OTHERS PRESENT: James C. Alexander, Eric Peterson, Kate Tripp.

I. Call to Order and Roll Call

Chairperson Stephens called the meeting to order at 9:30 a.m. She asked all members to introduce themselves as this is the first Council meeting in the 2007-08 Council year.

II. Approval of Minutes of June 15, 2007 meeting

Beth Hanan pointed out that Diane Diel was not present at the meeting.

MOTION: Judge Wedemeyer moved, seconded by Judge Mason to approve the minutes of the June 15, 2007 meeting as amended showing Diane Diel not present.

Motion passed unanimously.

III. Mission of the Judicial Council

Chairperson Stephens read through the Commission's enabling statute and a discussion followed as to keeping the work of the Council in context. Judge Leineweber suggested that in regards to § 758.13(2)(e), Stats., that there be a Council agenda item every meeting on court decisions or pending legislation concerning court procedures and operation. Such an agenda item would give Council members an opportunity to keep current. Chairperson Stephens agreed, but suggested that each member keep track of court decisions and legislation in their particular area of expertise and report to the Council rather than having a single person undertake this assignment of reporting at every meeting.

Judge Leineweber then led a general discussion of the power to regulate court practice and procedure between the Supreme Court and the Legislature. Judge Leineweber provided the Council with a written memo on the issues involved. Each branch, the court and the legislature, has a core zone of exclusive authority upon which another branch may not intrude, but there are areas of shared powers. The promulgation of rules of pleading, practice, and procedures, can be among these shared powers. The court, by statute, shall promulgate rules to regulate pleading, practice, and procedure, in judicial proceedings in all courts but those rules shall not abridge, enlarge, or modified the substantive rights of any litigant. The legislature also has the right to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure. It is important for the Council to recognize these mixed rules during the course of its work.

IV. 2007-09 Budget Report

Senator Taylor reported that the budget is in conference committee but that the Judicial Council amendments are not presently under discussion. Senator Taylor suggested that it is not too early for the Council to begin thinking about its recommendations for the next biennial budget. It is likely that the Council will have to make a budget recommendation to the Governor in September 2008.

V. Review of Pending Referrals to the Judicial Council

Chairperson Stephens said that Judge Maxine White has withdrawn her referral concerning the permissible uses for and recipients of seized drug money.

Beth Hanan said that recent court decisions addressed some of the problems regarding when a circuit court order is a final order for appeal purposes. The suggested study in that regard is probably not as necessary as a result. Judge Wedemeyer said that his appellate court district has sent out suggestions on orders to the trial courts. The consensus of the Council was to table the study.

Justice Bradley said that the Supreme Court may, on its own motion early next year, raise the issue of the citation of unpublished opinions. She suggested that the Judicial Council may wish to weigh in on the issue if the Court takes that action.

A discussion was held on what the Council could do to receive information from or have input to the Commission on Uniform State Law. Judge Mason said that at the June meeting the Council suggested that Professor Grenig monitor the activities of the Commission and report to the Council.

The Council received a study request from Randall Paulson of the Wisconsin Public Defender Appellate Division. The request was that the Council study and make recommendations concerning whether the § 48.356(2), Stats., written warnings to a parent about the possible termination of their parental rights should be provided in the language in which the parent speaks. After considerable discussion, the consensus of the Council is that this is indeed an issue but a small piece of a larger issue concerning the interpretation of all court orders in the language of the recipients. The consensus of the Council was not to study the issue at the present time but rather leave it up to court administration to address as a part of a larger ongoing study.

The Supreme Court Planning and Policy Advisory Committee recommended that the Judicial Council explore the Federal Rule approach to plea withdrawal when a negotiated recommended sentence is not imposed by court, and effect of such a rule on the number of appeals, and the potential development of a similar rule in Wisconsin. Chairperson Stephens suggested that Court of Appeals Judge Richard Brown meet with the Council and update it on the project. Professor Schultz advised that the Criminal Procedure Code Revision did not adopt the approach suggested. The consensus was to have Judge Brown meet with the Council in the future to discuss the issue.

Beth Hanan withdrew her request to the Council for study and recommendations concerning opposition to a request from a non-party for publication of a Court of Appeals decision.

VI. Committee Reports

A. Appellate Procedure

Marla Stephens reported that the committee met over the summer and finalized a draft concerning the use of pre-sentence investigation reports. The draft was sent to the UW-Law School advisory committee that is studying the same subject. The committee is getting feedback on the issue from stakeholders and will meet again on October 9, 2007.

B. Criminal Procedure

Professor Schultz sent a letter to the Chief of the Legislative Reference Bureau requesting assistance and the assignment of a staff attorney on the revision of the Criminal Procedure Code. Professor Schultz is also working on a bullet point summary of the proposed revision.

C. Evidence and Civil Procedure

Judge Mason reported that the committee met over the summer but will not meet after today's meeting. Bob McCracken agreed to check with the Litigation Section of the State Bar on what it was doing on the question concerning required answers to complaints in 20 days in certain types of cases but 45 days in others. Professor Grenig offered to inform the committee about developments in electronic discovery. The committee is also going to contact Marquette University Law School Professor Dan Blinks to find out specifically what changes he believes are necessary in the Code of Evidence and what level of commitment he would make to the substantial project of reviewing and revising the Code of Evidence.

D. Internal Operating Procedures

The committee had no report.

E. Strategic Plan

Judge Leineweber reported that the Strategic Plan Study was moving along and he was hopeful that John Ferry would have a report for the October meeting. John's time on the project has been interrupted by his work in Bosnia.

F. PPAC Liaison

Judge Leineweber reported that the video-conferencing petition has been filed with the Supreme Court and will be set for a public hearing.

VII. Other Business

Senator Taylor advised the Council of potential legislation in the area of custody cases, the use of court commissioners, and the release of findings by the Sentencing Commission on racial disparity in sentencing. Senator Taylor suggested that lawyers and judges may want to have input to the Legislature on the need for and effectiveness of any legislation proposed on these important issues.

VIII. Adjournment

The Council adjourned by consensus. Council adjourned at 11:35 a.m.