

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 17, 2008

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

MEMBERS PRESENT: Chair Marla J. Stephens; Vice-Chair Beth E. Hanan, Allan M. Foeckler, William C. Gleisner, Professor Jay Grenig, Representative Bill Kramer, Catherine A. La Fleur, Professor David E. Schultz, Senator Lena Taylor (via telephone), A. John Voelker, Honorable Mary K. Wagner, Greg M. Weber.

MEMBERS EXCUSED: Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable Patricia S. Curley, Honorable Edward E. Leineweber, Robert L. McCracken, Stephen R. Miller, Kathleen A. Pakes, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Robin Ryan, Legislative Reference Bureau Drafting Attorney; Madu Enwemnw, Legislative Aide for Senator Taylor; Sandy Lonergan, State Bar of Wisconsin.

I. Call to Order and Roll Call

Chair Stephens called the meeting to order at 9:35 a.m. All members and guests introduced themselves.

II. Approval of September 19, 2008 Minutes

The following amendments to the September minutes were noted: 1) spelling of "Meeting" in the caption; 2) spacing in council member La Fleur's name; 3) Item IV. - delete duplicate "the" and remove apostrophe following "municipalities" in the last paragraph on page four; 4) Item VIII. A. - revise to read "notice of appeal" and change SB 421 to SB 420; and 5) Item VIII. B. - insert names of subcommittee members.

MOTION: Council member Weber moved, seconded by Vice-Chair Hanan, to accept the minutes as amended. Motion unanimously approved.

III. Discussion and/or Action Regarding Request to Review Rule 814.29, Security for Costs, Service and Fees for Indigents

Chair Stephens reported to the Council that in October 2007, the Appellate Procedure Committee discussed comments previously received from the State Public Defender Appellate Division and Senator Sullivan's staff regarding payment of fees by indigents. The current rule allows a person to commence an action without paying costs or fees if the court enters an order to that effect. An indigent party must first file an affidavit with the court setting forth the nature of the claim or appeal, and facts demonstrating indigence. The rule requires the court to find that a person is indigent if they are represented by the public defender's office or a legal services program for the indigent. Current law does not state that if you have an appointed attorney, you

are exempt from payment of fees. The question is whether or not, in practice, the courts are requiring affidavits and orders before waiving payment of fees and costs from persons with appointed attorneys. If not, it may be preferable to amend the rule to conform to practice, or to amend the rule so that it no longer requires orders and affidavits in cases with appointed attorneys. Council member Taylor suggested that perhaps other resources, such as the Legislative Council, could be utilized to compile information regarding actual practices in the clerks of courts offices. Council member Voelker volunteered to work with his staff in the Director of State Courts Office and will report back to the Council regarding current practices and problems, if any, associated with the requirement that an indigent party file an affidavit with the court to obtain a waiver under Rule 814.29.

IV. Discussion and/or Action Regarding Municipal Court Bill Draft LRB 2894/1

The Council reviewed the draft memorandum of recommendations to Senator Taylor, prepared by Attorney Southwick. With regard to the recommendations related to post-judgment provisions, Chair Stephens noted that “appellate” should read “appellant.” Vice-Chair Hanan suggested a specific reference to a “waiver” of transcript fees.

Council member Schultz stated that the memorandum accurately reflected the recommendations and discussion regarding pre-trial procedures.

With regard to dispositions, council member La Fleur suggested clarification to state “an agreement by the recipient organization,” under Section 113.

Council member Wagner stated that the memorandum accurately reflected the recommendations and discussion regarding judges. After a brief discussion, the consensus was to delete the phrase “the appearance of.” Vice-Chair Hanan also suggested that the recommendation state “municipal judges in small jurisdictions.”

With regard to court administration recommendations, council member Voelker suggested revising the last sentence under Section 41 referencing educational requirements. The Council discussed various options. Council member Weber suggested that in the future, memorandums of this nature should contain a disclaimer that the recommendations contained herein should be considered in conjunction with the Council minutes reflecting any discussion or action related to the item.

MOTION: Representative Kramer moved, seconded by Greg Weber, to delete the last sentence under Section 41. Motion approved, with Vice-Chair Hanan opposed.

Council member Voelker also suggested clarification of the comments under Section 94 to reflect that there is an administrative benefit to the amendment. The consensus was to include a specific reference to the fact that municipal courts may cross judicial district lines, and that this section “would assist efficient judicial administration.” Also, the last line was amended to read “...do not require a judge to be a lawyer to those that do require it.”

Council member La Fleur noted that the last sentence of the first paragraph was missing the word “to.”

Attorney Southwick was directed to amend the memo consistent with the Council’s discussion and forward it to Senator Taylor’s office. Senator Taylor will share the Council’s recommendations with the LRB drafters, and bring any revised drafts back to the Council for further review and recommendation.

VII. Discussion of Request to Review Chapter SCR 81 – Compensation of Court-Appointed Attorneys

Council member La Fleur stated that the work group (council members La Fleur, Gleisner, McCracken and Pakes) will review the information compiled by Attorney Southwick, and convene to discuss it prior to the next council meeting. Senator Taylor volunteered to join the work group.

VIII. Committee Reports

A. Appellate Procedure

The committee met on October 8 to begin reviewing the comments they received regarding the draft presentence investigation report proposals that were circulated over the summer. Chair Stephens anticipates that the committee will complete its review and discussion of the comments in two or three meetings and will prepare a revised draft of their recommendations.

Vice-Chair Hanan reported on the supreme court’s public hearing regarding the Council’s Rule Change Petition #08-02 to allow citation to unpublished appellate opinions. She summarized positions taken by various individuals at the hearing, as well as comments and questions from the justices. While the justices voted to amend the rule to allow citation to unpublished opinions, they elected to make significant revisions to the Council’s proposal. The justices tentatively voted to allow citation of authored unpublished court of appeals opinions (one and three-judge opinions), but not *per curiam* opinions, memorandum opinions or summary dispositions and orders. The justices also modified the Council’s petition to: 1) require service of a copy of any cited unpublished opinion on the opposing parties; 2) state that parties have no duty to cite unpublished opinions; 3) make the rule effective on July 1, 2009; and 4) state that the rule will be prospective only. Finally, the justices voted to review the rule in three years and to create an evaluation committee to assist the court with implementation, to suggest data that should be collected for the review (including how to measure the cost to litigants), to suggest a procedure by which the court can evaluate the rule, and to assist with the review. The justices also voted to publish the Judicial Council note. The court will circulate a draft rule and enter an order in the near future.

Council member Weber stated that he was asked to serve on the evaluation committee and inquired as to whether it would conflict with his duties as a council member. The consensus of the Council was that it would not.

B. Criminal Procedure

Professor Schultz gave a brief update on the project to amend the criminal procedure code. He stated that the subcommittee consisting of Chair Stephens and council members Pakes and Weber will be meeting with him today immediately following the regular council meeting. Robin Ryan, LRB drafter, indicated that three additional chapters are partially finished.

C. Evidence and Civil Procedure

Attorney Southwick reported that the committee met via conference call and decided to submit the draft of proposed rules for electronic discovery to several additional organizations for comment. The additional drafts, along with a request to provide comments by November 6, 2008, have been sent out. The committee will meet again on November 21, 2008 at 7:30 a.m. at the Judicial Council office.

IX. Other Business

A. PPAC Liaison's Report

There was no PPAC Report.

B. Council Attorney's Report

Attorney Southwick notified the Council that she and Judge Leineweber have prepared the Council's report to the Judicial Conference. She also notified the Council that Judge George Curry has been nominated to fill the Judicial Conference's current vacancy, and the election will be held at the November Judicial Conference meeting.

Attorney Southwick advised the Council about the open meetings law. She briefly addressed the requirements that must be satisfied to hold a meeting, including notice to the public at least 24 hours in advance, a location accessible to the public, and discussion limited to the topics listed in the notice. She explained that a quorum of members can only discuss council business at a properly noticed meeting. She informed the Council about walking quorums, and cautioned council members about using email to communicate with each other regarding official council business.

Following a brief question and answer period, Attorney Southwick was directed to compile the information in memorandum form, and to contact the Attorney General's office and Legislative Council for additional information on recommended practices.

X. Adjournment

MOTION: Council member Weber moved, seconded by council member Wagner, to adjourn the meeting. Motion unanimously approved.

The Council adjourned at 11:00 a.m.