

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 15, 2010

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

MEMBERS PRESENT: Chair Beth E. Hanan, Vice-Chair Professor David E. Schultz, Michael R. Christopher, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Senator Lena Taylor, A. John Voelker, Honorable Mary K. Wagner, Greg Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Thomas W. Bertz, James M. Brennan, Honorable Patricia S. Curley, Allan M. Foeckler, Thomas L. Shriner, Marla J. Stephens.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, State Bar of Wisconsin, Margaret Porco, State Bar of Wisconsin; Kate Battiato, Office of Representative Hebl; and Aaron Saeugling, Office of Senator Lena Taylor.

I. Call to Order and Roll Call

Chair Hanan called the meeting to order at 9:40 a.m.

II. Approval of September 17, 2010 Minutes

MOTION: Council member Wagner moved, seconded by Council member Hebl, to approve the September 17, 2010 minutes. Council member Weber asked for an amendment to reflect that his concern regarding the ghostwriting project arose under the Sixth Amendment, not the Fifth Amendment. Minutes were approved unanimously, with the noted correction. (Council member Weber later notified Attorney Southwick that the correction should be made to the Appellate Procedure Committee minutes, not the Judicial Council minutes.)

III. Discussion and/or Action Regarding Meeting Locations

Chair Hanan reminded members that the Council previously discussed holding one or two meetings each year at a location outside the State Capitol. Attorney Southwick reported that she contacted Marquette University Law School, and Dean Kearney indicated the law school would be happy to host a meeting of the Judicial Council. Attorney Southwick and Dean Kearney discussed the possibility of the Council taking up a topic at the meeting that would be of interest to law students, or perhaps of interest to a particular class. Dean Kearney suggested that the Council forward several possible dates, as well as a proposed topic or topics for discussion.

Council member Taylor questioned the adequacy of available parking at Marquette University, and suggested that the Council could coordinate a meeting with the City of Milwaukee or the 4th Street Forum. She suggested that Channel 25 and Wisconsin Eye may

televise it, which would provide greater visibility for the Council and its work. She suggested that perhaps Milwaukee's Judiciary Committee could host the meeting.

Council member Wagner spoke in favor of holding the meeting at Marquette University Law School. She suggested that the Council could schedule a discussion of the presentence investigation report (PSI) project and invite criminal law defense attorneys, public defenders and prosecutors to attend the meeting. Attorney Southwick stated that the PSI project was the example she discussed with Dean Kearney because criminal law students might be interested in the topic. Council member Taylor stated that the PSI project is of interest to more than just the legal community. She emphasized the need to engage those who are directly impacted by PSI's. She expressed her opinion that members of the public impacted by PSI's are not likely to attend a meeting on the campus of Marquette University.

Council member White spoke in favor of holding a meeting at Marquette University Law School. She recounted her experience chairing a statewide commission that used media outlets to broadcast meetings to other remote locations, and suggested that the Council could do the same. For example, she explained that Marquette University has technology which allows a meeting to be telecast to the MATC system, and audiences that are physically present at remote locations can relay questions or comments back to the group conducting the meeting.

Chair Hanan asked Attorney Southwick to research the available technology and the availability of different groups with which to coordinate the meeting. One consideration should be the particular juncture of the Council's discussion of the PSI project. Council member Taylor also suggested involving groups such as Community Justice Council, Prison Action Milwaukee, and CAPA (Christian Association for Prison Aftercare). She emphasized her desire to reach individuals and groups who would otherwise not be engaged in this project and seek out their comments.

Council member Weber suggested that members of the Council who live in the Milwaukee area could submit information to Attorney Southwick regarding stakeholders, groups, and organizations that may be particularly interested in the PSI project so that they can be specifically invited to attend the meeting, regardless of where the Council ultimately decides to hold it.

Attorney Southwick asked the Council to suggest a few dates that she can share with possible venues. The Council suggested a target date of February or March, preferably the day of the regularly scheduled meeting. Council member Wagner suggested asking Council member Stephens for input regarding when a meeting at an alternative location will best fit in with the PSI project and whether the meeting should be primarily a work session or a listening session.

IV. Discussion and/or Action Regarding Requests for Input on the Following Supreme Court Rule Change Petitions:

- A. Amendments to SCR 81 Relating to Compensation to Court-appointed Attorneys (Petition No. 10-03)**
- B. Establishment of Standards and Procedures for Permanent Revocation of License to Practice Law (Petition No. 10-04)**

- C. Amendments to SCR 20:1.15(e)(2)a. and SCR 20:1.15(cm)(3), regarding trust account rules (Petition No. 10-05)**
- D. Amendments to amendments to Wis. Stat. § 885.42(4) (Petition No. 10-06)**

Chair Hanan explained that the Judicial Council is one of a number of entities that routinely receives copies of pending rule change petitions from the supreme court, along with an invitation to submit written or oral comments, as appropriate. The proposed amendment to SCR 81 (Petition No. 10-03) is the only issue currently before the court that was studied by the Judicial Council. Chair Hanan stated that copies of the minutes documenting Council discussion on this topic were provided to the court. Council member Roggensack provided an update on the status of Petition No. 10-03. She stated that the petitioners appeared before the court and provided an overview of the proposed changes. The matter will continue to be discussed at future supreme court hearings and/or administrative conferences.

Chair Hanan announced the scheduled hearing dates for the above petitions, and invited any interested member to submit comments. In particular, Council member Roggensack encouraged trial judges and lawyers to comment on Petition No. 10-06, a proposal to clarify when court reporters must transcribe recordings that are played in court.

No formal action was taken on this item.

V. Discussion and/or Action Regarding Rules for the Discovery of Electronically Stored Information (Petition No. 09-01)

The Council's amended petition regarding the discovery of electronically stored information (ESI) was previously adopted by the supreme court, with the exception of the rule regarding discovery conferences. The Council's amended petition provided for discretionary discovery conferences; however, the court amended the proposal to include mandatory discovery conferences in all cases involving discovery of ESI.

The court asked for written comments on the newly adopted rules by August 31, 2010. No written comments were received. The court extended the deadline for written comments from circuit court judges until September 22, and received two comments.

Council member Leineweber reported that the new rules were the topic of another supreme court public hearing on September 30th. Five members of the Evidence & Civil Procedure Committee attended the hearing, including Judges Sankovitz and Leineweber; and Attorneys Gleisner, Moriarty and Bertz. Attorney Southwick also attended. Council member Leineweber thanked everyone for their participation. At the hearing, the supreme court discussed further amendments to the provision regarding mandatory discovery conferences. The court also discussed incorporating the cost shifting factors found in the federal rules to provide further guidance to trial courts in cases involving electronic discovery. The rules, as previously adopted, are effective January 1, 2011, although the court stated its intent to adopt further amendments prior to the effective date. Judge Sankovitz volunteered to assist court staff with further revision to the rule regarding discovery conferences.

VI. Discussion and/or Action Regarding Wisconsin Rules of Evidence
A. “Records of Regularly Conducted Activity”, Wis. Stat. § 908.03 (6)

Council member Leineweber reported that the committee continues to follow the work plan approved by the Council for the review of a list of evidentiary rules. The committee recently completed its review of Wis. Stat. § 908.03 (6), records of regularly conducted activity, including consideration of the *Palisades v. Kalal* case. Professor Blinka previously suggested the inclusion of a self-authentication provision similar to the one found in s. 908.03 (6m) (b), healthcare records authentication. The committee discussed the self-authentication provisions already contained in Wis. Stat. § 909.02 (12) and (13) and determined that they obviate the need for the proposed addition of an authentication provision. The committee discussed the addition of a requirement that copies of records must be provided or made available to opposing parties at least 40 days prior to trial; however, no problems were identified with the operation of current law so the committee did not recommend a change. Attorney Southwick prepared and distributed a memorandum detailing the committee's work and containing the committee's recommendation. With regard to s. 908.03 (6), the committee recommended no amendments.

The committee also discussed the *Palisades v. Kalal* case, a debt collection case in which the court of appeals found that the submitted affidavit did not establish a prima facie case for summary judgment because it did not show that the affiant was a witness qualified, based on personal knowledge, to testify to the elements required for admissibility of the account statements under the hearsay exception for records of regularly conducted activity. The committee discussed whether the issue in the *Kalal* case could be avoided by amending the self-authentication provision. The committee ultimately concluded that the issues raised in *Palisades v. Kalal* would be more appropriately addressed through substantive laws directed at consumer protection, which is outside the scope of the committee's current charge under the rules of evidence work plan.

Council member Hebl reported that the legislature will once again be considering legislation in the up-coming session which will require debt purchasers to meet the same evidentiary standards required of the original creditors. He thanked the committee for its consideration of the issue.

MOTION: Council member Hebl moved, seconded by Council member Weber, to accept the committee's recommendation and take no further action.

VII. Committee Reports
A. Appellate Procedure

In the absence of Council member Stephens, Chair Hanan reported that the committee met on September 17, 2010 to receive an update on the introduction of the presentence investigation project to the full Council. The committee made several recommendations regarding how to proceed with presenting the proposal.

The committee also began discussing ghostwriting of legal documents. The committee will continue to discuss the ghostwriting project at the meeting later today, and Judge Anderson will attend to discuss his reasons for bringing the project to the Judicial Council.

B. Criminal Procedure

Vice chair Schultz reported that the Legislative Reference Bureau (LRB) consolidated all the chapters of the proposed amendments to the rules of criminal procedure into one draft bill. It contains a number of additional notes and questions from LRB drafting attorneys, although they do not appear to be substantive. He will review the notes and questions and consult with the other members of the work group (Council members Stephens and St. John), if needed, to prepare responses to the LRB.

C. Evidence and Civil Procedure

Council member Leineweber reported that the committee met three times over the summer to continue its work on the rules of evidence project and e-discovery. The committee is currently reviewing Wis. Stat. § 908.06, character for truthfulness, and Wis. Stats. §§ 907.03 and 907.05, bases of expert opinion. At its meeting later today, the committee will begin discussing Rule 502 of the Federal Rules of Evidence, and whether Wisconsin should consider adopting a similar provision to address the inadvertent disclosure of privileged information during discovery. Bill Gleisner will give a presentation on Rule 502 at the committee's meeting later today, and Judge Sankovitz will be joining the committee for an in-depth Rule 502 discussion next month.

VIII. Other Business

A. Supreme Court Advisory Committee on Rules Petitions Procedure Report

Chair Hanan reported that the supreme court has created an advisory committee to consider changes to the court's process for reviewing and acting on rule change petitions. She has been appointed as a member of the committee. The committee has met once, and a second meeting is currently being planned.

B. PPAC Liaison's Report

Council member Voelker reported that PPAC reviewed the supreme court's budget proposal and made recommendations. In particular, the proposal provides for additional funding to the counties for operation of the circuit courts through a circuit court support surcharge. It is the first increase in support to the counties since 1999. PPAC has also approved a petition to improve court facilities security.

C. Assembly Judiciary Committee Report

Council member Hebl serves as co-chair of the Legislative Council's Judicial Discipline and Recusal Committee, and he reported that the committee is considering issues such as tie votes by the supreme court in cases involving recusal or discipline, as well as issues surrounding

campaign financing, including disclosure and recusal. Vice Chair Schultz also serves on the committee. The committee has received extensive public testimony, including testimony from several supreme court justices. The committee will meet again on November 18, 2010. Council member Hebl offered to provide the Judicial Council with the committee's findings and recommendations, which he hopes to report to the Legislative Council by the first of next year.

D. Senate Judiciary Committee Report

Council member Taylor serves as chair of the Legislative Council's Criminal Justice Funding & Strategies Committee. She reported that the committee met on August 30, 2010, and formed three subcommittees, including: 1) the Funding Component, chaired by David O'Leary, and tasked with developing recommendations regarding prosecutor and public defender position needs in Wisconsin; 2) Courts and Effective Justice Strategies, chaired by Dennis Rome, tasked with recommendations for effective collaboration between the courts and other elements of the criminal justice system; and 3) Justice System Funding, Organization, and Strategies, chaired by Thomas Caywood, and tasked with developing recommendations relating to funding the court system. The Courts and Effective Justice Strategies Subcommittee will meet on October 21, 2010. The Funding Component Subcommittee will meet on October 22, 2010. The Justice System Funding, Organization, and Strategies Subcommittee will meet on October 25, 2010.

E. Legislative Reference Bureau Report Regarding Matrix Codes

Council member Miller reported that Wisconsin legislative bills will soon display a graphic code called a "matrix code" that contains a hyperlink. An internet-connected cell phone (i.e. Blackberry, iPhone, Droid, etc.) can be used to scan the matrix code to display a web page containing the bill history and status. He demonstrated the new technology.

F. Council Attorney's Report

Attorney Southwick reported that she worked with Council member Leineweber to draft the Judicial Council's annual report to the Judicial Conference. The report contains a summary of the Council's work over the past year, as well as an update on new and on-going projects. Council member Leineweber will present the report at the Judicial Conference business meeting on October 22, 2010. Attorney Southwick distributed a copy of the report to council members.

IX. Adjournment

Chair Hanan announced that the next Council meeting is on November 19, 2010.

The Council adjourned by consensus at 11:00 a.m.