

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
November 20, 2009

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, Thomas W. Bertz, Honorable Ann Walsh Bradley, Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Robin L. Ryan, Professor David E. Schultz, Rebecca St. John, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: James C. Boll, Professor Jay Grenig, Kathleen A. Pakes, Senator Lena Taylor, A. John Voelker.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Kate Battiato, Office of Representative Hebl.

**I. Call to Order and Roll Call**

Chair Stephens called the meeting to order at 9:35 a.m. All members introduced themselves to Judge Ptacek, the newest member of the Council elected by the Judicial Conference to fill a vacancy. Judge Wagner was re-elected to a second term on the Council by the Judicial Conference.

**II. Approval of October 16, 2009 Minutes**

The minutes were approved by consensus with no amendments.

**III. Discussion and/or Action Regarding Substitution of Judge in Termination of Parental Rights Cases**

The Council received a request from Judge Mason, a former Council member, to review Wis. Stat. § 48.422(5), regarding substitution of judges in termination of parental rights cases. Under the current statute, each party has a right of substitution and if a new judge is appointed at the request of one of the parties, the other party has 10 days in which to request a substitution. Judge Mason proposes that substitution of a judge by a non-petitioning party other than the child shall not be granted unless all non-petitioning parties join in the request. He compared the change to Wis. Stat. § 971.20, which requires that a request for substitution in a criminal case where there are multiple defendants must be joined in by all the defendants. Council member Wagner spoke in support of the proposal. Chair Stephens expressed concern that this may be a substantive issue, not a procedural matter, so it may not be appropriate for Council action. Council member Leineweber suggested that it be referred to a committee for further study. Council member La Fleur observed that federal law requires that cases of this nature must proceed to trial in a very short time frame. In small counties with only one judge, it can be very difficult to comply with the time constraints if there are multiple substitutions. Council member

White supported Council member Leineweber's suggestion to refer this issue to a committee to obtain additional information, including whether this is a procedural or substantive change. Chair Stephens suggested that this request be referred to the Criminal Procedure Committee to obtain more information for the Council. She asked Attorney Southwick to prepare a research memo addressing whether the right of substitution is procedural or substantive, as well as the procedural background in which this situation arises.

#### **IV. Discussion and/or Action Regarding Parliamentary Rules and Procedures for Conducting Meetings**

At the previous meeting, Council member St. John moved, seconded by Council member La Fleur, to adopt the Modern Rules of Order as the parliamentary rules of procedure used to conduct the meetings of the Judicial Council. After further discussion, Council member Hebl moved, seconded by Council member La Fleur, to table this item to allow council members to review the Modern Rules of Order prior to voting on this item. The motion to table was approved unanimously.

Chair Stephens reopened discussion of this item. Council member Bertz spoke in favor of adopting the Modern Rules of Order, based on his experience operating under these parliamentary rules at the State Bar Board of Governors' meetings. Several members expressed concern that procedural rules could be misused to obstruct discussion. Chair Stephens explained that rules would guide her when multiple motions have been made or motions are amended.

Council member Leineweber suggested that the matter has been sufficiently discussed, and asked the Chair to bring it to resolution. Chair Stephens called for a vote. The motion passed, with Council members Bradley and White opposed. Attorney Southwick was asked to order a copy of the rules for each member.

#### **V. Discussion of Request to Review SCR 81-Compensation of Court-Appointed Attorneys**

Council member La Fleur introduced a discussion regarding Supreme Court Rule 81. This project came to the Council at the request of the supreme court. Attorney Charles Senn sent a letter to Chief Justice Abrahamson requesting that the supreme court review SCR 81.02, and increase the hourly rate paid to court-appointed attorneys. The court forwarded Mr. Senn's letter to the Judicial Council with a formal request that the Council "review Mr. Senn's request and advise the Court if the Council believes such a revision is warranted." The rule currently provides for review of the hourly rate by the court every two years, although this has not historically been done.

A Judicial Council work group comprised of Senator Lena Taylor, Attorney Bob McCracken, District Attorney Kathy Pakes, Attorney Bill Gleisner and Attorney Catherine La Fleur began a review of the rule. The work group considered the following changes: 1) Keep \$70 per hour as the minimum rate in cases involving indigent parties; 2) change "appointing authority" to "appointing court" in an effort to encourage the courts to exercise their discretion in

non-indigent cases; 3) add \$100 per hour as the minimum rate in non-indigency cases; 4) whenever the court exercises its discretion in setting a fee above \$100 per hour, that it employ the criteria set forth in SCR 20:1.5 ; and 5) add a provision that if the parties are indigent, any reimbursement ordered pursuant to 81.01 will be fixed by the court and reviewed annually, upon the court's or parties' petition, until the reimbursement amount is paid in full.

Chair Stephens suggested that the Council must be prepared to explain why they would recommend a higher rate when the rule already authorizes the payment of a higher rate. Council member La Fleur stated that Milwaukee county courts regularly award rates in excess of \$70 per hour, although she does not believe that occurs in all counties. She suggested that the amendment may make it easier for all courts to exceed the minimum rate because it would provide clear guidelines. Council member Leineweber pointed out that not all counties require payment directly from the party to the guardian ad litem (GAL). Some counties pay the GAL's fees and then seek reimbursement from the party. He also inquired as to whether counties reported difficulty obtaining competent GAL's at the current \$70 per hour rate. Council member White stated that Milwaukee children's court maintains a preapproved list of attorneys who meet certain minimum qualifications and experience. They are paid a rate lower than \$70, unless it is an unusually difficult case. She said most other appointments are pursuant to contracts. Council member La Fleur stated that the work group's recommendation would not impact fees paid pursuant to contract because SCR 81 provides an exception for rates set by contract. Council member Hebl added that the legislature is considering a bill to raise the rate paid to private attorneys taking appointments from the public defenders office from \$40 per hour to \$70 per hour.

Chair Stephens suggested that the Council should be prepared to answer the following questions before making a recommendation:

1. Why was the rate set at \$70 per hour initially?
2. Have circumstances changes such that the rate needs to be recalibrated?
3. What are counties currently paying?
4. Are counties having difficulty finding representation at the current rate?
5. Is there a problem with the quality of the attorneys providing services at the current rate?

Council member Bradley suggested that the county boards or the County Association may have an interest in weighing in on this issue, as well. Attorney Southwick will obtain additional information in response to the questions posed by the Chair, and consult with the County Association and Director of State Courts. Council member Christopher suggested that the Council begin its inquiry by obtaining answers to the last two questions posed by the Chair. He proposed that if those questions are answered in the negative, then no further research is needed. To obtain information to answer the questions posed, Council member Curley suggested polling family court judges to determine whether they perceive the current rate to be a problem. Council member La Fleur also suggested contacting the family law section of the State Bar.

## **VI. Discussion and/or Action Regarding Wisconsin Statutes Chapter 799 and Time Computation in Small Claims Cases**

Council member Leineweber introduced this item, reminding the Council that they previously discussed it and referred it back to the Evidence & Civil Procedure Committee to obtain some additional information on current practices. Council member Leineweber reported that the committee obtained additional information that indicates the rule is not being applied uniformly between counties, so after further consideration, the committee renews its previous recommendation to add a definition to define “day” as a “calendar day.” The committee’s proposal would reconcile the statute with unpublished appellate case law.

**MOTION:** Council member Leineweber moved, seconded by Council member La Fleur, to approve the recommendation of the Evidence & Civil Procedure Committee to add a definition to define “day” as a “calendar day” in Wis. Stat. § 799.03. The motion was approved unanimously, with Justice Bradley abstaining.

Chair Stephens asked Attorney Southwick to conduct further research to determine whether this amendment is appropriate for a rule change petition to the supreme court.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Committee chair Stephens reported that the Appellate Procedure Committee is finalizing a recommendation concerning the presentence investigation amendments. It will be ready for review by the full Council in the near future.

### **B. Criminal Procedure**

Committee chair Schultz reported that the Legislative Reference Bureau (LRB) has completed drafting the proposed bills, and the subcommittee has received clean copies of all but two of the bills. The subcommittee will be ready to meet to respond to LRB drafters’ questions in the near future.

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

Committee chair Leineweber reported that due to Council action taken earlier in the meeting, the committee has completed its review of the small claims matter involving calculation of “days” under chapter 799.

The committee continues to review and discuss possible amendments to the rules of evidence. At its meeting later today, the committee will continue to discuss the rule of completeness, Wis. Stat. § 901.07, and the possible addition of a bias rule. Council member Bradley requested additional information regarding the discussion of the bias rule. Committee chair Leineweber explained that when the committee proposed elimination of the Deadman’s statute, it was suggested that perhaps a bias rule should be considered, in recognition of the

public policy behind the original adoption of the Deadman's statute. He stated that the committee is reviewing rules from other states, and discussing whether it would be helpful to codify current Wisconsin case law.

He further reported that the petition regarding discovery of electronically stored information (Pet. No. 09-01) has been set for a hearing on January 21 at 9:30 a.m. Attorney Southwick, Committee chair Leineweber, Committee member Gleisner and former Committee member Judge Sankovitz will attend and present at the supreme court hearing on the petition. Chair Stephens added that Attorney Southwick will also be presenting at the December 4 meeting of the State Bar Board of Governors to seek State Bar support for the petition.

Attorney Southwick informed the Council that Marty Kohler has been appointed as an ad hoc committee member. As a criminal defense attorney, Mr. Kohler will bring another perspective to the committee's review of the rules of evidence. The committee would also like to appoint a prosecutor to serve as an ad hoc member, but has not been successful in locating a volunteer yet.

## **VIII. Other Business**

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

Council member Leineweber stated that the most recent PPAC meeting was canceled, so there is no report.

### **B. Assembly Judiciary Committee Report**

Council member Hebl explained that a small claims bill (AB 524) has been introduced that would create a two-tiered system. One tier would remain for amounts in controversy of \$5,000 or less, and second tier would be added for controversies up to \$10,000. The second tier would only be available to those parties who file less than 20 small claims cases per year. There would be a penalty for those parties who fail to accurately disclose the number of filing per year that would include a fine and dismissal of the claim.

Council member Hebl also updated the Council on other legislative activity including a bill to increase bankruptcy exemptions to be signed by the Governor on December 1. Additionally, the legislature has proposed declaring a state microbe to call national attention to Wisconsin's status as a leading cheese producer and its title as the dairy state. He also notified the Council of a pending legislation that will require purchasers of credit to comply with the same rules that would apply to the original creditors in collection litigation.

### **C. Senate Judiciary Committee Report**

There was no committee report.

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

Attorney Southwick reported that she attended the Judicial Conference earlier this month and as a result of the Judicial Conference's election of Judge Ptacek to fill a vacancy, the Council now has full membership.

The Council's web site administrator has asked whether she should remove older minutes from the site, or whether the Council would prefer to keep them available on-line. The administrator confirmed that storage space is not an issue at this time. Attorney Southwick explained that in addition to posting approved minutes on-line on its web site, a paper copy is maintained in the Council office. Copies are distributed to the State Law Library, the Legislative Reference Bureau Library and the University of Wisconsin Law Library, although she does not believe that any of those entities make the minutes available via the internet. The Council agreed by consensus to continue to make past minutes available on the web site.

The petition to amend Wis. Stat. § 904.085 (4) (e), communications in mediation (Pet. No. 09-12) has been filed. Notice of the hearing regarding Petition No. 09-01 (discovery of electronically stored information) has been sent to interested parties including those who were asked to provide feedback to the Evidence & Civil Procedure Committee during the drafting process.

The Institute for the Advancement of the American Legal System (IAALS) has issued a final report and draft rules for a pilot project they developed in conjunction with the American College of Trial Lawyers. Attorney Southwick anticipates receiving those documents and guidelines on implementation prior to the next meeting, and will distribute them for Council review. The Seventh Circuit Court of Appeals will also implement a pilot project regarding rules for the discovery of electronically stored information, which they developed in consultation with the IAALS. At least one judge in Wisconsin's Eastern District will be implementing a similar project.

## **IX. Adjournment**

Chair Stephens inquired as to members' availability for the December 18 meeting, given its close proximity to Christmas. A number of members indicated that they would be unavailable to attend.

**MOTION:** Council member White moved, seconded by Vice-Chair Hanan to cancel the Judicial Council's December 18, 2009 meeting. The motion was approved unanimously.

The Council adjourned by consensus at 11:10 a.m.