



## STATE OF WISCONSIN – JUDICIAL COUNCIL

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### MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN SEPTEMBER 18, 2020

The Judicial Council met at 9:35 a.m. on September 18, 2020 via Zoom.

**MEMBERS PRESENT:** Chair William Gleisner; Judge Eugene Gasiorkiewicz; Christian Gossett; Judge Thomas Hruz; Steven Kilpatrick; Margo Kirchner; John R. Orton; Adam Plotkin; Thomas L. Shriner; Adam Stevenson; Judge Robert VanDeHey; Senator Van Wanggaard (by phone); and Sarah Zylstra.

**MEMBERS EXCUSED:** Sarah Walkenhorst Barber; Judge Scott Needham; Diane Fremgen; and Representative Ott.

**SPECIAL GUESTS:** Lynne Davis (State Bar); Michaela Paukner (Wisconsin Law Journal, by phone); Paige Scobeck (Hamilton Consulting);

- I. Roll Call and approval of the June 19, 2020 Minutes.**
- II. Report from the Council’s Budget Committee by Chair Adam Plotkin, including his discussion of the following actions taken by the Committee during this past summer:**
  - A. July 20, 2020 Budget Committee Meeting;**
  - B. August 20, 2020 Budget Committee Meeting;**
  - C. September 10, 2020 Budget Committee Meeting.**
- III. Consideration by the Council of the Budget Committee Request submitted to Department of Administration and request for Council ratification of the work of the Budget Committee (the Budget Committee Request will be distributed later next week).**

#### **IV. Report on discussions between Adam and representatives of the Supreme Court and the Office of Director of Courts. Discussion and vote on how to proceed regarding those discussions.**

Mr. Plotkin stated that all agenda items will be dealt with together. The Committee met three times over the summer. He noted that the main part of the budget was at 18 and 19. Mr. Plotkin reported that he contacted the Director of Courts to inquire about providing an “in kind” contribution in the form an office, a computer, etc. He discussed this possibility with the Budget Director of the Director of State Courts who gave guidance on how to frame such a request.

Mr. Plotkin also asked the Director State Courts, Judge Koschnick, directly about whether he would be amenable to us putting that in the budget and the response was that the Court was not interested in providing an in kind donation. Looking at page 19, line 6, dealing with supplies and services, this denial impacted our budget request because the \$22,600 request at line 6 would have gone down to zero if the an in kind contribution had been made.

The budget was structured so that the main part of the request would begin at the start of the 2<sup>nd</sup> year of the biennium, thus reducing the cost by delaying the start date, which was one of the ways we were striving to show recognition by the Council of the impact of the pandemic on all budgeting requests. So what we requested was \$2000 during the first year of the biennium related to recruitment costs and helping to get a new staff person up to speed. Essentially, it was envisioned that we would have 12 months to do recruitment and training so that on July 1<sup>st</sup> 2022 the staff person could begin work right away. We put the salary of a staff person during the 2<sup>nd</sup> year of the biennium at \$65,000 base salary, which is consistent with the last request in 2019. Our analyst at the DOA thought this was reasonable.

Margo Kirchner raised some concerns about the strategy of asking for funding just during the second year of the biennium and made several related points as well. Gleisner asked her to join the budget committee going forward, and she agreed.

Ms. Zylstra asked why the Court was unwilling to give an inkind contribution. Mr. Plotkin said there was little explanation other than a brief email saying the Court won’t agree to such a contribution, citing an Order from around three years ago that the Court will not be funding the Council.

Gleisner then expressed the opinion that it may be wise to approach the Supreme Court directly concerning the Council’s relationship with the Court. Senator Wanggaard suggested that there should be a face to face meeting with the Court might be in order. The Senator said he believes that the Court understands what

the Council does and its importance. And he said he thinks they know that the Council cannot continue to exist without resources. The Senator stressed the overall importance of the Council and how it has in the past saved considerable taxpayer money by dealing with issues using volunteers. The Senator stressed that the Chief Justice has made it clear to him that she supports the Council and thinks it is important. After all, she served on the Council a number of years ago. At a minimum, the Supreme Court should appoint a Justice to fill the Supreme Court vacancy on the Council. The Senator offered that he would be very happy to participate in a meeting between the Council and the Chief.

Gleisner suggested that he join with Senator Wanggaard and Sarah and endeavor to schedule a meeting with the Chief Justice to discuss improving relations between the Council and the Supreme Court in general and to discuss the appointment of a Supreme Court representative to the Council. There was no objection.

John Orton asked if the decision to deny funding is a Court decision or just a decision which falls within the executive power of the Chief. The Senator stated that he thought that it would be the Chief. The Senator did acknowledge that when he last met with the Chief Justice she was supportive of the Council but still expressed concern about what happened previously with our then administrative secretary. The Senator stated that maybe the Council did not do enough back in the day to educate the Court that the proposed increase was not just for pay but was a change in how we categorized the secretary. Having said all that, the Senator stated that he now thinks that is all water under the bridge.

The Senator also raised again the possibility that the Legislative Council might be willing to provide space for the Council but he does not know where that's at given the effects of the pandemic.

Ms. Zylstra asked the Senator whether it was important that funding come from the Court or from the Legislature. The Senator stated that he thinks the funding should be from the Legislature so that the Council can stay independent.

**V. Report of Judge Thomas Hruz, Chair of the Council's Appellate Practice Committee, concerning a draft Petition and Supporting Memorandum prepared by the Appellate Committee regarding proposed modifications to Wis. Stat. §809.85 of the Wisconsin Rules of Appellate Procedure.**

Judge Hruz then addressed his Appellate Practice Committee's proposed draft Petition and Supporting Memorandum. The Judge asked if there were any comments or questions that Council members had regarding the Petition. Gleisner asked two questions. First, if the Council gave its permission, are you ready to file the Petition and Memorandum now? Judge Hruz answered "yes." Second, could

you summarize the point or points of the Petition? Judge Hruz responded as follows. Previously, the issue involved was addressed by one short statute which stated only that an attorney appointed by a lower court would continue to act until a court relieved him of further duties. This led to a patchwork of responses by Courts when confronted with post trial proceedings. The Appellate Practice Committee wanted to adopt consistent and logical procedures which would apply to all courts in Wisconsin. Tom Shriner asked if this new rule applied only in criminal cases and Judge Hruz said no this new rule would apply to all non-criminal cases, except for TPR (Termination of Parental Rights). The proposed new rule specifically excludes 809.30 (criminal appeals) and 809.32 (no merit reports).

Ms. Zylstra suggested that withdrawing counsel including in a motion to withdraw a reference to any upcoming important dates so that a pro se party would not be surprised. Judge Hruz responded that such a provision already exists in the proposed rule. Judge Hruz also stated that in (g) there was a failsafe provision which would toll times except with regard to petitions to review. In other words, the filing of a motion to withdraw would automatically trigger the tolling of times.

Tom Shriner then asked what kind of cases would be covered by this rule. Judge Hruz stated that many cases would involve situations where civil counsel are being changed or switched. An example of where the proposed rule would be important is one where a civil attorney tells a client “I am not comfortable doing appeals and you need to find someone who does.” This rule will kick in to protect the client from any dropped balls while the search for replacement counsel proceeds.

Ms. Zylstra also noted that this might often arise where an attorney has been appointed pro bono to represent a poor person and, after the trial or relevant proceedings, the pro bono counsel wishes to withdraw. Ms. Zylstra further pointed out that pro bono cases she does on the federal level often involve civil cases for prisoners (e.g., a medical malpractice case against a prison doctor or case involving cruel and unusual punishment). Judge Hruz essentially agreed.

Discussion was then had about who should sign the petition and the memo in support. It was agreed that Judge Hruz should do so, but to be safe the acting secretary of the Council should also sign it.

Christian Gossens moved to approve the petition and memorandum and prepare it for filing. Sarah seconded the motion and it passed unanimously

**VI. Discussion of new projects for 2020, including one involving the Appellate Practice Committee and one relating to the possible creation of a new role for the Judicial Council.**

There were several new projects that were discussed and one of the projects is also before Judge Hruz's Appellate Practice Committee. This involves issues of competency post judgment or post verdict, and in this area we are talking about criminal proceedings. Judge Hruz's Committee is studying the possibility of a new section in Ch. 809 which will deal with how to handle 971.14 proceedings (governing incompetency). However, the current rule clearly only applies to trial court proceedings and this has created a number of problems. The goal is to come up with procedures that will incorporate relevant state court procedures into appellate rules. There are a host of problems which cannot now be conveniently handled in appellate court (e.g., medication issues).

Gleisner then asked Adam Plotkin and Professor Stevenson to discuss the possibility of the Council taking over the UW's role of overseeing production of pattern jury instructions. There was a lengthy discussion and it was clear that others may be interested in doing this. The consensus was that this was a matter that should be discussed further at the next meeting after the issue receives attention elsewhere.

## **VII. Committee Reports.**

### **(a) Evidence & Civil Procedure Committee.**

Tom Shriner did not have a report.

### **(b) Criminal Procedure Committee.**

Judge VanDeHey tried to start a meeting to follow this one, but no one appeared.

### **(c) Appellate Procedure Committee.**

Judge Hruz has given this report earlier.

## **VIII. Adjournment.**

The Council adjourned at 11:30 a.m.