

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
October 26, 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; Professor Jay Grenig; Beth E. Hanan, Vice-Chair; Catherine A. LaFleur; Honorable Edward E. Leineweber; Honorable James Mason; Robert L. McCracken; Bruce Munson; Kathleen A. Pakes; Professor David E. Schultz; Greg M. Weber; Honorable Ted E. Wedemeyer, Jr.

**MEMBERS EXCUSED:** Michael R. Christopher; Allan M. Foeckler; Kathleen Grant; Representative Bill Kramer; Senator Lena Taylor; A. John Voelker; Honorable Mary K. Wagner; Honorable Maxine White.

**OTHERS PRESENT:** Elizabeth Montemurro; Marilyn Parks; Eric Peterson; Chris Wren.

**I. Call to Order**

Chairperson Stephens called the meeting to order at 9:30 a.m. She introduced guests Eric Peterson, a member of Senator Taylor's staff; Chris Wren, who will speak on the citation to unpublished opinions agenda item; and Marilyn Parks, serving as today's recorder. (Elizabeth Montemurro, also a member of Sen. Taylor's staff, arrived later during the meeting.)

**II. Approval of Minutes**

MOTION: Judge Mason moved, seconded by Beth Hanan to approve the minutes of the September 21, 2007 meeting.

Motion passed unanimously.

Following the approval of the minutes, Chair Stephens proceeded to agenda item V to accommodate the schedule of guest presenter Chris Wren.

## **V. Discussion of Citation to Unpublished Opinions**

At Chair Stephens request, Judge Mason made opening remarks, and then asked Chris Wren to proceed with the discussion. Mr. Wren introduced himself and clarified that he is not appearing before the Council as a representative of, and does not speak for, the Department of Justice. He is using his vacation time.

Mr. Wren gave an overview of why he supports an amendment of Wis. Stat. (Rule) 809.23 (3) to allow citation to unpublished opinions. He was one of the co-petitioners of the 2002 Petition for an Order Amending Wis. Stat. 809.23 (3) asking the court to revise the non-citation rule. He would support a new petition to revise the non-citation rule, but he is not personally interested in being a petitioner again.

Questions and discussion followed Mr. Wren's presentation. Mr. Wren stated that his position had changed slightly from what he proposed in 2002: he does not believe it is necessary to require parties to provide copies of cited unpublished opinions, and certain unpublished decisions that were exempt in the 2002 proposal should not be exempt. He suggested following the practice of the U.S. Supreme Court by allowing citation to all opinions that are available on the court's website.

When asked, Mr. Wren stated that he was unaware of any studies or reports that have come out since the Federal rule allowing citation to unpublished opinions went into effect that discuss the rule's effect on practice or its pros and cons.

Chair Stephens reviewed the Council's previous participation in the 2002 effort to change the non-citation rule. The Council's Appellate Procedure Committee worked with the Board of the Appellate Practice Section of the State Bar to determine what practitioners thought about this rule. Because no clear majority position emerged and no consensus could be reached, the Appellate Procedure Committee asked the Council if they wanted to file a petition asking the Court to re-examine the non-citation rule without making a recommendation to change it. The Council voted against filing a petition that did not contain a recommendation.

Justice Bradley noted that the Supreme Court is currently interested in taking a look at this decision again.

Chair Stephens proposed that the Council convene a small working group to 1) report to the Council about any studies of the effects of the new federal citation rule and 2) draft a rule change petition, substantially similar to the one that was presented to the Court in 2002, for the Council's November 16 meeting. The Council could then discuss the proposed rule change and vote on it. Chair Stephens has asked Robert McCracken, Professor Schultz, Allan Foeckler and Beth Hanan to be part of that group and welcomed Judge

Mason to participate if he is interested in being a part of the research and drafting. Additions and suggestions were requested, and Greg Weber suggested that the work group contact Dan Schweitzer at the National Association of Attorneys General. He is their US Supreme Court coordinator and may be able to give some information on how the federal rule is working out for the Attorneys General.

### **III. 2007-09 Budget Update**

Chair Stephens noted that the Council is grateful to Senator Taylor, Justice Bradley and Justice Prosser for obtaining a Council staff attorney position in this new budget. We could not have done it without those three critical people. She also thanked Justice Bradley for the celebration feast she provided this morning.

Chair Stephens presented a draft attorney position description and a draft announcement to the Council. She also asked for the Council's general approval to proceed with the hiring and transition process as outlined in a draft distributed at the meeting. She asked for input on the content of the drafts and on the process, today and going forward. A broad discussion, ideas and suggestions followed.

Chair Stephens has asked a small group to help with the hiring process (to develop screening instruments and interview questions, conduct interviews and reference checks, etc.). Members of this working group are Professor Schultz, Justice Bradley, John Voelker and Jim Alexander.

By consensus, the Council gave Chair Stephens approval to proceed with the process as generally outlined. She encouraged members to send their ideas and suggestions to her via email. She also reported that Jim Alexander and Laury Bussan of the Judicial Commission have indicated they will help the Council in any way they can with whatever needs to be done. She expressed the Council's gratitude for their consideration and efforts.

### **IV. National Center for State Courts Study**

Judge Leineweber reported that John Ferry, the consultant that the NCSC (National Center for State Courts) has assigned to this study, has not delivered his initial draft at this point due to reasons the consultant has made known to us. Judge Leineweber will seek another extension of funding from the State Justice Institute, which he anticipates will be granted without a problem, and will ask NCSC to determine whether and when Ferry will be able to complete the study, and, if necessary, to assign a different consultant to the study.

## **VI. Committee Reports**

### **A. Appellate Procedure**

Marla Stephens reported that the Committee met earlier this month and went through a list of very technical questions about the draft on pre-sentence investigation report procedures. An earlier draft of the proposed changes in pre-sentence investigation report procedures was sent off to the Remington Center Advisory Committee. They conducted one meeting and will schedule a second meeting to discuss and give us feedback about the draft. The Council Committee will meet on December 11<sup>th</sup>, after we receive the Advisory Committee's comments.

### **B. Criminal Procedure**

Professor Schultz reported that before the September meeting he contacted the Legislative Reference Bureau to ask who our assigned drafters would be and they got back to him immediately. He sent them one chapter this week—the one we most recently completed, Chapter 975. The drafters acknowledged receipt and said that they will get to work on it. It looks as though we can expect excellent cooperation from them, which means he will need to get more chapters ready to send.

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

Judge Mason reported that the Committee will meet after today's meeting. He asked Professor Grenig to brief the Council on what is currently the status of electronic discovery in state courts and also what is happening on the federal level. Prof. Grenig reported that some states have adopted rules on electronic discovery, while others simply require the parties to work things out. He feels it may be worthwhile to take those uniform rules and see if we can figure out what, if any, of those rules we should implement in Wisconsin.

Chair Stephens asked the committee to discuss the electronic discovery suggestion at its meeting today and report their recommendation for action to the Council at the November meeting.

### **D. Internal Operating Procedures**

The Committee had no report. Chair Stephens suggested that, since this committee has completed its charge, it should be removed from the regular committee reports agenda and placed in inactive status.

**MOTION:** Greg Weber moved, seconded by Bruce Munson to abolish the monthly reports of the Internal Operating Procedures Committee and to put this Committee in inactive status.

Motion passed unanimously.

E. Strategic Plan

Judge Leineweber reported that the Committee will not meet until the study is received from NCSC. This is not a permanent Committee.

F. PPAC Liaison

The petition to adopt the rules for videoconferencing is set for a hearing before the Supreme Court on January 8, 2008.

**VII. Other Business**

- At the last meeting there was discussion on how to keep up with new case law and new legislation. Chair Stephens has included that responsibility on the list of duties for the new staff attorney. However, in the interim, she asked the Committee chairs at every meeting to go around-the-table and ask committee members if they are aware of any new changes, and to then make that part of their Committee reports at the Council meetings.
- Judge Mason noted that Chair Stephens thanked many people for their role in getting the new staff attorney position and he wanted to thank Chair Stephens for her relentless efforts to re-instate Council staff and independence. Her organizing was a very important part of the process.
- Chair Stephens noted that Judge Mason is at the end of his two very productive terms on the Council. On behalf of the Council, she thanked him for the unique perspective and many good ideas that he brought to the table. The Council thanks him and will miss him. Judge Mason responded by saying that it has been a real honor to serve on this Council and to represent the judiciary and the Judicial Conference. It has been his pleasure and he encourages the Council to resolve the issue of the Supreme Court rule prohibiting citation of unpublished opinions, recommend a the rule change on electronic discovery, and to finalize the Criminal Procedure Code revision.

**VIII. Adjournment**

The Council adjourned at 11:30 a.m. by consensus.