

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
December 15, 2017

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Honorable Eugene A. Gasiorkiewicz, William C. Gleisner, Christian A. Gossett (appearing in part in person and in part midway through meeting), R. Duane Harlow, Devon M. Lee, Dennis Myers, Honorable Scott Needham (by telephone), Representative Jim Ott (departed before the end of the meeting), Benjamin J. Pliskie, Thomas L. Shriner, Honorable Jeffrey A. Wagner (by telephone), Senator Van H. Wanggaard, Professor Steven Wright, John R. Orton (by telephone), Diane M. Fremgen.

MEMBERS EXCUSED: Sarah Walkenhorst Barber, Honorable Robert P. Van De Hey, Sherry D. Coley, Justice Annette Kingsland Ziegler.

OTHERS PRESENT: Cale Battles, Wisconsin State Bar, Erika Strebel, Wisconsin Law Journal, Makenzie Reinke, Winnebago County District Attorney's Office.

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

Chair Bertz called the meeting to order and the roll call sheet was circulated.

**II. Approval of November 14, 2017 Meeting Minutes**

Draft minutes of the November 14, 2017 meeting were circulated in advance of the meeting.

MOTION: Motion to approve the minutes made and seconded and approved unanimously.

**III. Discussion and/or Action Regarding Staffing of Judicial Council, Including Any Potential Enhanced Role for Council Member Gleisner and Report on Possible Assistance from State Bar of Wisconsin**

Vice Chair Blanchard distributed in written form and then read from a statement, which he said he was happy to send to anyone else by email after the meeting, including those participating by phone. Summarizing for purposes of these minutes, he expressed the view that the Council has proven itself to be a very worthy state agency, as intended by the legislature, that advances clarity in the law at low cost on a completely nonpartisan basis, but that it cannot, at this time, function as designed without any funding or staff. He said that his current plan is to move, at the next Council meeting, Jan. 19, 2018, that either members resign en masse or the Council suspend its operation, or some variation on those concepts.

Council member Gleisner addressed the importance of the Council, in part because there are few attorneys in the legislature. He repeated that he is available to provide research for the Council. He said that “disbanding” would be contrary to the statute creating and authorizing actions by the Council, and also a disservice to the Bench, the Bar, and the legislature.

Rep. Ott expressed concern about resignations. For one thing, it might be difficult to rebuild the Council if the current strong membership were no longer involved. He expressed hope that discussions with the director of state courts and chief justice could help resolve the current problems.

Council member Gasiorkiewicz said he is aware of no one who questions the value of the Council, but at the same time he questioned the efficacy of the Council if it cannot function properly. He questioned whether the supreme court would reverse its position, and said he anticipated that we would be told to “march on” as we are able. He said he very much respects Mr. Gleisner and appreciates his offer to help, but expressed the view that because Mr. Gleisner’s background is on the plaintiff side in personal injury actions, this could undermine the neutral role that an attorney for the Council needs to fill.

Council member Gleisner said he did not think that his background as an attorney would be an impediment regarding the help he offers to provide, which would be “the day to day work” of the Council.

There was discussion at this point by several persons that was difficult to make out on the recorders.

Council member Pliskie said he thought that perhaps while we look to see what hope there might be on the horizon, perhaps the Council could cut back its meeting schedule and aspirations for producing results somewhat, and that the Executive Committee could explore with the director of state courts and the chief justice to see what progress could be made on support for the Council. He made a motion to this effect.

Council member Shriner said one example of the problems that will arise if the Council cannot operate has emerged recently with contemplated legislation that would be inconsistent with the class action rule that our supreme court has adopted. He provided other examples of situations in which, without staff, the Council cannot keep abreast of developments and play its important role in providing background and advice to the legislature and the supreme court on procedural rules. As for the generous offer by Mr. Gleisner to provide assistance, Mr. Shriner said that there is a reason why the statute speaks in terms of the counsel attorney being “nonpartisan.” He said his strong inclination is to vote to suspend operations. We have to be honest that we cannot do this job without staff support.

There followed discussion by one or more persons that was not clearly picked up by the recorders.

Vice Chair Blanchard said he understands the reluctance for members to resign, and that there is a substantial question about what it would mean for members to resign, but the reason he

floats the idea is concern about responsibilities and liabilities that could accompany holding one's self out as a member of a body that cannot accomplish any of what it is supposed to accomplish. As to suspension of activity, he said that given the recent actions of our supreme court and the Governor, it is difficult to see how we will avoid either official or effective suspension of our activities because we will continue to lack the staff to operate.

Council member Dennis Meyers said we should vote on the motion to have the Executive Committee approach the supreme court to find a resolution of the issues. Vice Chair Blanchard asked what would be the best possible answer we might receive at this point from our supreme court. Mr. Meyers responded that the best answer would be that the court would be able to find money within the court system to fund Council operations.

Diane Fremgen, representing the director of State Courts, said that she would convey to the director a summary of the comments that she was hearing at today's meeting.

There was discussion of the fact that Justice Ziegler is a member of the Council, and attempted unsuccessfully to have a designee appear on her behalf at Council meetings.

Council member Gasiorkiewicz said he believes it is an exercise in futility to send the Executive Committee to the supreme court because that body recently voted to cut off funding for the Council.

Council member Orton said he sees value in simply asking the supreme court what its pleasure is at this point, given what has occurred in recent months. Does the court want the Council to disband or suspend operations or take some other route?

Mr. Shriner repeated his report from the last Council meeting that justices have been very laudatory of the Council's work in his appearances on Council business and there has been no suggestion of dissatisfaction with the work of the Council.

Mr. Orton said it might be valuable to point out to justices that the class action-related bill referenced by Mr. Shriner is a good example of a situation in which the Council's continued work could be very helpful to the court. He wondered if the supreme court did not vote to defund the Council in an attempt to shift financial responsibility for the Council to some other part of the state budget, and not the court system's part of the state budget.

There was discussion among a number of speakers on the issue how the Council operated after the Council was defunded some years ago for a time. It was explained that staff of the Judicial Commission in some manner supported both the Judicial Council and the Judicial Commission, but that this was a period of very low activity for the Council and was not a good working model going forward.

Council member Needham expressed the view that, while the Council would no doubt function at a less productive level, if the various issues involving the day to day functioning could be absorbed by various Council members, it would not make sense not to proceed forward as best we can, making whatever contributions we are able to make.

Vice Chair Blanchard expressed the view that a critical function of the Council is to solicit, collect, review, summarize, and consider feedback from bench, bar, members of the public, including interested groups, on any potential rule petition or statutory change concept. There is no one to do that. We do not even have a representative to receive regular mail, email, telephone calls, much less to manage information in a systematic and organized way. He volunteered to take back to his office and look through the Council mail that has been delivered to the Council in recent months and address that stack as best he can, but he expressed the view that his going through the current stack of mail will not solve the problem going forward.

Sen. Wanggaard said that what happened here was a strong reaction by the supreme court to a particular situation and now it is a question of communication and making clear what is needed and how important the Council is.

Council member Gossett expressed the view that Public Meetings Law issues can get complicated and we do not want to run afoul of these rules. He said he wondered if perhaps the best approach would be say, we are not resigning, we are not suspending, but we are not meeting until someone gives us the means to hold lawful meetings. We are here and willing to appear in an identified room at any identified time, if you are ready for us to meet. We should say that we cannot be effective without a staff attorney and leave it up to the powers that be.

Mr. Gleisner pointed out that the statute creates a mandate for the Council to take actions. Mr. Shriner responded that the statute also creates a staff attorney, which we do not have.

Judge Needham expressed the view that the Chief Justice's comments at the judicial conference in support of the Council appear to be the cracking open of the door, and present an opportunity to go back to the court and see what is possible.

There was discussion among a number of people about the concept of inviting the Chief Justice and the director of state courts to simply come to a Council meeting and explain their current views. Several people expressed the view, however, that this would not be a practical solution.

Vice Chair Blanchard expressed the view that no matter what progress we might be able to make in soliciting interest in or commitments to support funding for the Council at some point the future, which no one on the Council opposes, that does not solve our immediate challenges, with which we are already quite familiar.

Mr. Meyers said in his view we should take action and move forward. Everybody knows that the question is money, and if we don't ask for the money then we are not going to get it.

Mr. Pliskie clarified the spirit of his motion. He said he is under no illusion that money is available. He said the question for the court is, how do you want us to do this? Is there even a way for us to do this? For example, the last time this happened, the Judicial Commission provided assistance. Is something like that an option?

MOTION: Allow the Executive Committee and any designees to meet with the director of state courts and/or the supreme court in an attempt to move forward from where we are at. There was a second by Mr. Gleisner. (There was a clarification after the vote that, in light of Public Meetings Law requirements, the Executive Committee could designate a subgroup to perform this task; this clarification was met with consensus approval). All voted in favor except for Vice Chair Blanchard, Judge Gasiorkiewicz, and Mr. Shriner.

**IV. Discussion / Action Regarding Location of Judicial Council Meetings**

Vice Chair Blanchard explained that, with assistance from our legislative members, we can continue to meet in this same room in the Capitol for future meetings, and we can use the free conference call service that we are using today, which seems to have worked fine.

**V. Discussion / Action Regarding Council Office Space and Property**

The Department of Administration has the lease on the Council office space, which contains files and property of the Council. There has been no action on this topic, and we will try to fold these issues into whatever resolution we may have on our status going forward in January 2018.

**VI. Discussion / Action Regarding Supreme Court Rule Petition 16-02A, Rules of Evidence**

This has been adopted by the supreme court and will shortly take effect.

**VIII. Discussion and/or Action Regarding Supreme Court Rule Petition 17-03, Class Actions**

This rule, adopting the federal rule of civil procedure, has been adopted by the supreme court and we are hoping that it will be issued soon. Mr. Shriner explained in some detail how the new potential legislative action in this area is inconsistent with the class action rule just adopted and why it matters, and Mr. Gleisner added detailed comments about the proposed legislation.

**IX. Discussion and/or Action Regarding Supreme Court Rule Petition 17-05, Multi-Party Briefing in Appellate Matters**

This was presented to the court in November, and approved with an effective date of July 1, 2018.

**X. Discussion and/or Action Regarding Supreme Court Rule Petition 17-07, Record on Appeal**

This has been filed, and the supreme court hearing is scheduled for Jan. 16, 2018. The committee would like direction from the Council to review the LRB comments and then decide what to say about those to the supreme court.

MOTION: The committee is authorized to review the LRB comments and present its views to the supreme court on January 16, 2018. Upon a motion and second, the vote in favor was unanimous.

**XI. Committee Reports**

**A. Appellate Procedure**

Nothing additional.

**B. Criminal Procedure**

Committee members circulated the latest draft of the discovery checklist, which appears ready for distribution to law enforcement agencies and district attorney offices. However, there was not time to discuss this item at today's meeting.

**C. Evidence and Civil Procedure**

Nothing additional.

**XII. Adjournment**

The Council adjourned by consensus.