

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
JANUARY 18, 2002

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

MEMBERS PRESENT: Ruth Ann Bachman (Vice-chair); Matthew J. Frank; Honorable James Mason; Honorable Gerald C. Nichol; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr. ;Honorable Lee Wells.

MEMBERS EXCUSED: Patricia Ballman; Scott C. Baumbach; Justice N. Patrick Crooks; Michael J. Gableman; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; J. Denis Moran; Bruce Munson; Marla J. Stephens; Professor Shirley A. Wiegand; one vacancy.

OTHERS PRESENT: James C. Alexander; Jason Westphal.

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

The meeting was called to order by Vice-chairperson Ruth Bachman at 9:30 a.m.

**II. Approval of Minutes of December 21, 2001, Meeting**

MOTION: Judge Wedemeyer moved, seconded by Judge Schmidt, to approve the minutes. PASSED UNANIMOUSLY.

**III. Committee Reports**

A. Appellate Issues Committee

Judge Wedemeyer reported that the committee met on January 17, 2002. The committee completed work on the trailer petition for the rules of appellate procedure. The committee will schedule a meeting on the pre-sentence investigation project for February, 2002.

B. Criminal Procedures Committee

Professor Schultz reported that the committee met after the December 18<sup>th</sup> full Council meeting and received a report from Michael Neimon, District Court Administrator for District III on video-conferencing. The committee also continued review of Chapter 969, one of the chapters already returned by the Legislative Reference Bureau. The committee still has work to do on Chapter 969.

On the issue of video-conferencing, the consensus of the committee was that there are many issues involved, some of which are beyond the scope of the Criminal Procedures Committee. Some of those issues include the availability of technology, constitutional considerations, public policy considerations concerning such matters as personal presence in criminal or civil cases to afford face-to-face confrontation, and some necessary statutory changes. The committee recommends that it consider the statutory changes as it goes through the revision of the Criminal Procedure Code but the rest of the issues should be referred back to the full Council for its consideration on how it would like to proceed on the project. A discussion followed on how the Council should proceed. The consensus was to have Professor Schultz provide written materials and a report on the Criminal Procedures Committee's findings and recommendation to the full Council which will then decide on how to proceed, for example the appointment of an ad hoc committee. The Council also discussed and left before for a decision at a later date whether to have Michael Neimon appear before the full Council. Judge Mason and Judge Nichol recalled that the Supreme Court, probably through PPAC discussed this issue and it may be helpful to get a history from the Director of State Courts on what that committee accomplished.

Finally, Professor Schultz reported that the committee reviewed the request from Senator Risser and decided to respond in the negative. A draft of a letter so informing Senator Risser will be distributed at the next meeting.

C. Evidence and Civil Procedure Committee

Judge Mason said that he will contact Betsy Abramson and advise her of the status of the committee's consideration of her request in March or April when the Council completes its work on discovery of children proposal. That proposal will be taken up at the next meeting and he hopes it can be completed at that time.

Judge Mason raised the issue of the need for extensive legislation regarding discovery of children given the current state of the law. Judge Mason said he would contact Professor Wiegand and discuss his thoughts before the matter is brought before the Council again.

D. Search Committee

The committee had no report. The committee is awaiting the outcome of the proposed budget reform bill to determine what funds will be available to the Council to appoint an independent contractor.

**IV. Other Business**

Judge Wells alerted the Council to upcoming criminal cases in the Court of Appeals and the Supreme Court.

**V. Adjournment**

MOTION: Timothy Vocke moved, seconded by Matthew Frank, to adjourn.

The Council adjourned at 10:35 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
FEBRUARY 15, 2002

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Matthew J. Frank; J. Denis Moran; Bruce Munson; Honorable Gerald C. Nichol; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr. ; Honorable Lee Wells.

MEMBERS EXCUSED: Ruth Ann Bachman; Patricia Ballman; Scott C. Baumbach; Justice N. Patrick Crooks; Michael J. Gableman; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; Honorable James Mason; Professor Shirley A. Wiegand; one vacancy.

OTHERS PRESENT: James C. Alexander; Mary Burke; Margaret Carlson; Joseph N. Ehmman; Dan Rossmiller; Jason Westphal.

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

The meeting was called to order by Chairperson Marla Stephens at 9:30 a.m.

**II. Approval of Minutes of January 18, 2001, Meeting**

On page two the first sentence under paragraph C, the name should be changed from Chief Justice Abrahamson to Betsy Abramson.

MOTION: Judge Wedemeyer moved, seconded by Judge Nichol, to approve the minutes as amended. PASSED UNANIMOUSLY.

**III. Council Response to Senator Risser Proposal**

Professor Schultz reported that at the Council's December 21, 2001 meeting, a letter from Senator Fred Risser setting forth a proposal of one of his constituents was referred to the Criminal Procedure Committee. The Committee discussed it

and authorized Professor Schultz to draft a reply. The Council received a written draft of the letter for its approval.

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Professor Schultz explained that the request suggested legislation to  
arrests mandatory in certain drunk driving cases. Senator Risser requested the views of the Council on the idea and asked whether the Council would support legislation requiring arrest where the suspect had a prohibited alcohol content  
as  
indicated by a preliminary alcohol screening test or when the suspect has  
refused  
a test. The Criminal Procedure Committee recommends that the Council not support legislation attempting to require arrest in situations like those described.

The committee felt that the decision whether to arrest is best trusted to the  
informed  
discretion of local police agencies and individual officers. Professor Schultz's response would explain the Council's position as recommended by the Criminal Procedures Committee.

MOTION: Bruce Munson moved, seconded by Tim Vocke, to approve Professor Schultz's response to Senator Risser's referral.  
PASSED UNANIMOUSLY.

#### **IV. Trailer Petition for Amendments to Rules of Appellate Procedure**

The Judicial Council received two proposed petitions to the Supreme  
Court  
following up the recent amendments to the rules of appellate procedure. Marla Stephens reported on behalf of the Appellate Procedures Committee that the  
first  
petition presents two alternative recommendations to the Supreme Court  
regarding  
service of any presentence investigation report on defense counsel or the defendant. The amendments would be to section 809.30(2)(g) statutes. The first alternative provides for a service of a copy of any presentence investigation report prepared in the circuit court case on the person's counsel if the person is represented by counsel while an unrepresented person may seek release of the report as permitted by law. The second alternative limits the service of presentence investigation reports to counsel appointed by the state public defender. Chairperson Stephens explained that the second alternative codifies existing case law, State ex rel. Oliver v. Guolee 179 WI 2<sup>nd</sup> 376, 507 NW 2<sup>nd</sup> 145 (Court of Appeals 1993). The appellate committee was unable to agree as to

which of the alternatives should go forward and decided to set forth these alternative recommendations.

Matt Frank expressed concerns about the prospect of presentence investigation reports ending up in the hands of unrepresented defendants where the confidentiality and privacy of victims and witnesses may be compromised. Frank emphasized the need to balance the rights of defendants to appeal with the interests of victims and witnesses not to have sensitive private information available to the public.

Chairperson Stephens reported that the Appellate Issues Committee had formed a sub-committee to comment on and study all presentence investigation report issues on appeal. The sub-committee is meeting for the first time after the full Council meeting. The present proposal before the Council addresses a specific situation only, that is providing a copy of the presentence investigation report by the clerk of circuit court to either any defense counsel or limiting the release to counsel appointed by the public defender.

MOTION: Judge Nichol moved, seconded by Denis Moran, to defer Council action on the petition until the sub-committee finishes its work and reports back to the full Council on its recommendations.

A discussion ensued in which Chairperson Stephens said that the petition is to codify case law or to slightly expand case law to allow service on post-conviction counsel of the presentence investigation report for the purposes of appeal without a court order. The Appellate Issues Committee believes the amendments are necessary to avoid unnecessary court orders and to relieve defense counsel of the time and expense of obtaining orders to get presentence investigation reports. Judge Nichol suggested that the sub-committee could talk with the clerks, for example in Milwaukee County, to assure that presentence investigation reports are kept and available for post-conviction counsel until the sub-committee could report back to the full Council.

The question was called. MOTION PASSED 7-3, Professor Schultz, Marla

Stephens and Tim Vocke voting against.

Chairperson Stephens then explained the other trailer petition which addresses various questions and suggestions presented to the Appellate Issues Committee during its training programs after the Supreme Court substantially adopted the Council's petition for new rules of appellate procedure. An executive summary of the proposals in the 2-4-02 draft petition was distributed to Council members.

MOTION: Judge Wedemeyer moved, seconded by Judge Nichol, to adopt the trailer petition as proposed. PASSED UNANIMOUSLY.

## V. Video-Conferencing Study

Professor Schultz reported that since the Criminal Procedures Committee did not meet after the January meeting there was no evaluation done on what video-conferencing matters could be incorporated into the Criminal Procedures Committee proposed revision of the rules of criminal procedure. The committee is meeting after the Council meeting today and will see what they can incorporate into its ongoing work and what matters should be referred back to the Council as a whole.

MOTION: Timothy Vocke moved, seconded by Denis Moran, to keep the video-conferencing study in the Criminal Procedures Committee for now. PASSED UNANIMOUSLY.

## VI. Committee Reports

### A. Appellate Issues Committee

Appellate Judge Wedemeyer reiterated that a sub-committee is meeting after the Council meeting on the issue of presentence investigation reports and appellate procedure. The sub-committee will give feedback to the Issues Committee on what matters need studying and what proposals to make.

changes

Dan Rossmiller, an aide to Senator George, reported that the to the rules of appellate procedure that need to be addressed to the Legislature have been put in draft form. He proposed that he discuss with Senator George the prospect of introducing the bill along with Representative Gundrum by request of the Judicial Council. This will allow the bill to be published so that interested persons can receive a copy to review and would allow the bill to receive a public hearing before the end of the legislative session, if time permits. The legislative session is scheduled to end on March 14, 2002. By consensus, the Council agreed with this procedure.

B. Criminal Procedures Committee

Professor Schultz reported that the committee is meeting after the full Council meeting today to continue going over drafts received from the Legislative Reference Bureau, specifically on Chapter 969.

C. Evidence and Civil Procedure Committee

Judge Mason was ill and unable to attend the meeting. Chairperson Stephens reported that Judge Mason told her that the committee will continue to review the discovery related to children proposal and will report back to the full Council when that review is complete.

D. Search Committee

Judge Nichol reported that the committee had not met. Jim Alexander said that the Governor's budget reform bill does not recommend decreasing the Judicial Commission's budget so the funds available in FY03 for independent contractors did not change. The Joint Committee on Finance may amend the Governor's proposal but that seems unlikely. Chairperson Stephens suggested that the Appellate Issues Committee may need considerable independent contractor staff work for the presentence investigation report study.

**VII. Other Business**

There was no other business.

**VIII. Adjournment**

The Council adjourned by consensus at 10:46 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
MARCH 15, 2002

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Ruth Ann Bachman; Justice N. Patrick Crooks; Matthew J. Frank; Honorable James Mason; Bruce Munson; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr..

MEMBERS EXCUSED: Patricia Ballman; Scott C. Baumbach; Michael J. Gableman; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; J. Denis Moran; Honorable Gerald C. Nichol; Honorable Lee Wells; Professor Shirley A. Wiegand; one vacancy.

OTHERS PRESENT: James C. Alexander; Jason Westphal.

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

The meeting was called to order by Chairperson Marla Stephens at 9:30 a.m.

**II. Approval of Minutes of February 15, 2002, Meeting**

The draft meeting minutes should strike from the third full sentence on the top of page 3 the phrase "or an unrepresented defendant."

MOTION: Judge Wedemeyer moved, seconded by Judge Schmidt, to approve the minutes as amended. PASSED UNANIMOUSLY.

**III. Committee Reports**

A. Appellate Issues Committee

Marla Stephens reported that the committee met on March 12, 2002. The committee discussed how it would address issues and concerns raised by the sub-committee meeting on how to handle

presentence investigation reports and appeals. The committee also heard that the court of appeals was on board with the changes contained in the proposed trailer petition to the amendment of rules of appellate procedure. The committee also discussed the study of replacement of Supreme Court justices due to recusal, disability or discipline.

Judge Wedemeyer reported that the committee has finalized its proposed amendments to Section 809.24 statutes as an addition to the trailer petition. The proposed petition addresses potential problems and motions for reconsideration and has received the approval of the court of appeals. Two major changes to the statute are the deletion of the word "order" and the elimination of the requirement that the court of appeals order a response to a motion for reconsideration prior to amending a decision.

MOTION: Judge Wedemeyer moved, seconded by Ruth Bachman, to adopt the petition as submitted. PASSED 9-0, Justice Crooks abstaining.

Marla Stephens said that Senator George by request of the Judicial Council introduced 2001 Senate Bill 490, which contains the amendments to appellate procedure requiring legislative action. Although the bill was introduced it is obvious that the Senate will adjourn its session before the bill is considered. Having the bill introduced and made public is of some benefit to the Council, however.

#### B. Criminal Procedures Committee

Professor Schultz said that the committee met on February 15, 2001, and worked on the two chapters completed by the Legislative Reference Bureau, principally Chapter 969. The committee is meeting today and will probably complete its review of all of the work done by LRB to date.

#### C. Evidence and Civil Procedure Committee

Judge Mason said that the committee is meeting after the full Council meeting today. Judge Mason reported that he wrote a letter to Betsy Abramson on the committee's timing to review the topic of continuing legal education requirements for guardian ad litem to adults.

The committee is also working on the discovery of children matter and will get a draft of revisions to the full Council in the near future.

D. Search Committee

There was no search committee report. Chairperson Stephens suspended the work of the committee until the budget reform law goes into effect at which time the Council will know what kind of funding will be available to it in the next fiscal year.

**IV. Other Business**

Jim Alexander reported that Professor Shirley Wiegand had resigned from the Council and asked the Dean of Marquette Law School to replace her. It appears that Professor Jay Grenig will be appointed to the Council as representative from Marquette University Law School.

Bruce Munson said that the revisor's bill will be introduced to amend Section 751.12 to increase the quorum at Council meetings from nine to eleven because the size of the Council has changed since the implementation of 751.12. All Council members should be alert to this so the Council can have a quorum at each meeting. On the issue of Council quorums, Jim Alexander noted that there was severe weather in the northwest part of Wisconsin and yet Council members from the northwest part of the state, Ruth Bachman and Tim Vocke, traveled to the Council meeting.

**V. Adjournment**

MOTION: Bruce Munson moved, seconded by Ruth Bachman, to adjourn.  
PASSED UNANIMOUSLY.

The Council meeting adjourned at 10:10 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
APRIL 19, 2002

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Ruth Ann Bachman; Justice N. Patrick Crooks; Matthew J. Frank; Michael J. Gableman; Honorable James Mason; Bruce Munson; Honorable Gerald C. Nichol; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr..

MEMBERS EXCUSED: Patricia Ballman; Scott C. Baumbach; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; J. Denis Moran; Honorable Lee Wells; Professor Shirley A. Wiegand; one vacancy.

OTHERS PRESENT: James C. Alexander; Jason Westphal.

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

The meeting was called to order by Chairperson Marla Stephens at 9:30 a.m.

**II. Approval of Minutes of March 15, 2002, Meeting**

MOTION: Judge Wedemeyer moved, seconded by Ruth Bachman, to approve the minutes of March 15, 2002, meeting. PASSED UNANIMOUSLY.

**III. Budget Reform Measures**

Jim Alexander reported that the budget reform act has been winding its way through the Legislature. The Committee on Joint Finance recommended a \$2,200 reduction in the Commission's budget for FY03. The Assembly version of the bill included a budget reduction of \$3,300. The Senate version of the bill adopted Joint Finance's \$2,200 reduction for the Judicial Commission. The matter is now in

conference committee. Concerns were raised by Council members about the position of the Judicial Commission on apportioning any budget cut to the Judicial and Council. Alexander reported that the Commission has not discussed the matter and probably will not do so until the budget reform act is passed and signed into law. Alexander reminded the Council that the Commission's budget proposal for the next biennium will probably have to be submitted to the Governor sometime early in the fall of 2002. Therefore, when the Judicial Commission does review the results of the budget reform act it will do so in light of the needs of the Commission and the Council for the next three years.

#### **IV. Committee Reports**

##### **A. Appellate Issues Committee**

Marla Stephens reported that the committee is meeting today and will make work assignments on the presentence investigation report rules. The Committee will focus on this project for the next several months but it is unlikely that the matter will be ready for any Council action until fall. She also reported that the trailer petitions on the new rules of appellate procedure have been filed but public hearings on those matters will not take place until the fall. The legislation proposed by Senator George for changes in the appellate rules died as expected at the end of the session. There simply was not enough time to have the legislation considered between the time it was filed and the time the Senate adjourned all of its work except for budget matters.

##### **B. Criminal Procedures Committee**

Professor Schultz said the committee met last month and finished review of the Legislative Reference Bureau's revisions of Chapter 969. The committee will get to Chapter 973 on sentencing but will await whatever truth-in-sentencing legislation comes out of the budget process. Professor Schultz has been advised that LRB will return to work on the proposed changes to the Criminal Procedure Code in the near future as the budget process in the legislature winds down. Professor Schultz found this news to be very encouraging and he may call committee meetings over the summer if LRB finishes additional chapters.

C. Evidence and Civil Procedure Committee

Judge Mason reported that the committee is meeting today to finalize the Chapter 48 discovery in proceedings regarding children proposal so that the matter can be presented to the Council at the May meeting.

V. Other Business

The Council received a copy of a petition requesting the Supreme Court to consider an amendment to Rule 809.23(3) statutes concerning the citation of unpublished opinions. The petition was filed by Howard B. Eisenberg, Patience D. Roggensack, Warren D. Weinstein and Christopher Wren . No hearing date has been set on the petition.

By way of background, Chairperson Stephens explained that this issue came up during the Supreme Court hearing on the Judicial Council's petition for partial publication of court of appeals opinions. A proposal similar to the present petition was considered by the Judicial Council last fall but did not garner consensus so the Council did not file anything.

Judge Mason suggested that the proposal presented to the Council may have had different language than the present proposal. He suggested that the Council review the matter again in light of the present petition.

**MOTION:** Professor Schultz moved, seconded by Judge Mason, to place Council discussion of the present petition requesting the Supreme Court to consider an amendment to Rule 809.23(3) on the May Judicial Council agenda. PASSED 8-3 (Judge Wedemeyer, Judge Nichol and Chairperson Stephens voting against). (Bruce Munson had left the meeting)

In additional other business, Jim Alexander reported that Dean Eisenberg of the Marquette University Law School has appointed Professor Jay Grenig as the Marquette Law School Representative to the Judicial Council. Professor Grenig replaces Professor Shirley Wiegand. Hopefully, Professor Grenig can be present at the May Council meeting.

**VI. Adjournment**

MOTION: Ruth Bachman moved, seconded by Professor Schultz, to adjourn.  
PASSED UNANIMOUSLY.

The Council meeting adjourned at 10:20 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
MAY 17, 2002

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Ruth Ann Bachman; Justice N. Patrick Crooks; Matthew J. Frank; Jorge A. Gomez; Professor Jay Grenig; Honorable James Mason; Bruce Munson; Honorable Gerald C. Nichol; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke.

MEMBERS EXCUSED: Patricia Ballman; Scott C. Baumbach; Michael Gableman; Senator Gary George; Representative Mark D. Gundrum; J. Denis Moran; Honorable Ted E. Wedemeyer, Jr.; Honorable Lee Wells; one vacancy.

OTHERS PRESENT: James C. Alexander; Jason Westphal; Jennifer Strei (Senator George's office).

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

The meeting was called to order by Chairperson Marla Stephens at 9:30 a.m. Chairperson Stephens welcomed Professor Jay Grenig as Marquette University Law School representative to the Council. Upon Professor Grenig's request, Chairperson Stephens assigned him to the Evidence and Civil Procedure Committee. Chairperson Stephens also welcomed Jennifer Strei from Senator George's office to the meeting.

**II. Approval of Minutes of April 19, 2002, Meeting**

MOTION: Judge Nichol moved, seconded by Judge Mason, to approve the minutes of April 19, 2002, meeting. PASSED UNANIMOUSLY.

**III. Chapter 48: Discovery of Children Proposal**

Judge Mason presented the proposal of the Evidence and Civil Procedure Committee regarding discovery directed to children in Chapter 48. The new statute would be numbered 48.293. Judge Mason pointed out that the proposal actually

makes only a few changes in the existing statutes in Chapter 48 in order to accomplish providing for the best interest of children when it comes to discovery. The major addition to the chapter is proposed 48.293(1) which essentially provides for discovery based upon the court's discretion after motion and hearing.

MOTION: Judge Mason moved, seconded by Tim Vocke, for adoption of the proposal and to file a petition with the Supreme Court seeking enactment of the proposal in its entirety.

Discussion on Judge Mason's motion followed. Ruth Bachman said that the shorter than usual time in proposed 48.293(3) had not only been reviewed by the District Attorney's Association but other constituencies interested in the proposal as well and met with their approval.

Chairperson Stephens offered a friendly amendment to Judge Mason's motion to change the word "longer" in (3) with the word "different." Judge Nichol also suggested a friendly amendment to delete the phrase "an attorney" in (1) leaving only the phrase " a guardian ad litem." Both Judge Mason and Tim Vocke accepted the friendly amendments.

Matt Frank began a discussion of the reasons for the language changes in (3) and in (3)(a) and (3)(b). The committee members present at the meeting could not recall the precise reason for the language and how the subsections were meant to fit together. Judge Mason suggested taking the comments on (3) and (4) back to the committee for review.

MOTION: Ruth Bachman moved, seconded by Bruce Munson, to table Judge Mason's motion until the next meeting.

MOTION: Judge Nichol moved, seconded by Matt Frank, to amend the tabling motion to table action on (3) and (4) until the next meeting. PASSED 11-0, Justice Crooks abstaining.

MOTION: Judge Mason moved, seconded by Tim Vocke, to adopt the proposed provisions in 48.293 (1), (2), (5), 48.295 and 804.01, deleting the phrase "an attorney" in (1) and petitioning the appropriate agency for adoption of the proposal. PASSED 11-0, Justice Crooks abstaining.

#### IV. Discussion of Citation of Unpublished Opinions

Chairperson Stephens gave a brief background on the present petition filed with the Supreme Court to allow the citation of unpublished opinions in certain circumstances. The petition has not been set for hearing. The petition contains similar language to a proposal that was before the Council in the fall of 2001 but was not adopted for lack of consensus either in the Appellate Issues Committee or in the Council as a whole.

Ruth Bachman said she compared the present petition with the proposal before the Council last fall and found it to be substantially the same. She did not think it would be advisable for the Council to take a position on the present petition now. Judge Mason said that he feels the Council has an obligation to get in the middle of such proposals despite their controversial nature. Judge Mason and Jorge Gomez then gave specific instances where citations of unpublished opinions would have been helpful. Ruth Bachman responded that the Council has not avoided the issue but has already addressed it and could not reach a consensus.

Professor Schultz suggested that if a Council member wanted the Council to support or oppose the present petition before the Supreme Court a motion to that effect should be made. Chairperson Stephens asked for any motions and none were made. There was no further discussion.

#### V. Committee Reports

##### A. Appellate Issues Committee

Marla Stephens said that the committee met on May 15, 2002. The committee has divided itself into work groups on various topics associated

with pre sentence investigation reports on appeal. That study will not be ready for Council review until next fall. Marla Stephens also said that the Department of Natural Resources through staff attorney Charles Hammer alerted the Council to the fact that DNR has requested a public hearing on proposed revisions to that department's administrative rule governing, in part, procedures for contested cases. Stephens said that she would give DNR's proposal to the Appellate Issues Committee for its information. The committee has on its list of things to do a study of the review of administrative agency actions.

**B. Criminal Procedures Committee**

Professor Schultz had nothing new to report and is awaiting completion of further drafts of the proposed revision of the Criminal Procedure Code by the Legislative Reference Bureau. The committee is also awaiting truth-in-sentencing legislation that may come out of the present budget reform bill conference.

**C. Evidence and Civil Procedure Committee**

Judge Mason reported that the study of mandatory continuing legal education for guardian ad litem for adults is on the committee's to do list but the committee probably could not start with that study until the fall.

Michael Gableman has requested appointment to the Criminal Procedures Committee and Chairperson Stephens made that appointment.

**VI. Nominating Committee**

Chairperson Stephens appointed Tim Vocke, Chair, Judge Schmidt and Justice Crooks to the nominating committee to nominate a chair and vice-chair for the Council's 2002-03 year. The committee is expected to report at the June 21, 2002 meeting.

**VII. Other Business**

Chairperson Stephens alerted Council members to the fact that as a result of a Revisor's Bill, Section 758.13(3)(b) statutes has been amended to require 11 rather than 9 members for a quorum of the Council. Chairperson Stephens encouraged all Council members to make attending Council meetings a priority.

The next Council meeting is scheduled for June 21, 2002, and will began at 8:30 a.m. with a breakfast at the Inn on the Park in Madison.

### **VIII. Adjournment**

MOTION: Ruth Bachman moved, seconded by Jorge Gomez, to adjourn.  
PASSED UNANIMOUSLY.

The Council meeting adjourned at 11:12 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
NOVEMBER 16, 2001

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Ruth Ann Bachman; Patricia Ballman; Matthew J. Frank; Honorable James Mason; Honorable Earl W. Schmidt; Professor David E. Schultz; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr.; Honorable Lee Wells; Professor Shirley A. Wiegand.

MEMBERS EXCUSED: Scott C. Baumbach; Justice N. Patrick Crooks; Michael J. Gableman; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; J. Denis Moran; Bruce Munson; Honorable Gerald C. Nichol; one vacancy.

OTHERS PRESENT: James C. Alexander; Gretchen Viney.

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

The meeting was called to order by Chairperson Marla Stephens at 9:50 a.m. The meeting was delayed as Council members coming to Madison from southeastern Wisconsin were delayed by stalled traffic on the interstate westbound.

**II. Approval of Minutes of October 19, 2001, Meeting**

Professor Schultz called the Council's attention to a misspelling in the second sentence of the first paragraph under subheading D. Search Committee.

MOTION: Judge Schmidt moved, seconded by Timothy Vocke, to strike the last sentence in paragraph 1 in subsection D. Search Committee. PASSED UNANIMOUSLY.

the MOTION: Professor Wiegand moved, seconded by Matt Frank, to approve minutes as amended. PASSED UNANIMOUSLY.

### **III. Committee Reports**

#### **A. Evidence and Civil Procedure**

Chairperson Stephens asked the Evidence and Civil Procedure Committee to report out of order. Jim Alexander reported that he attended the hearing before the Supreme Court on the Sanctions Petition on Tuesday, November 13, 2001. Professor Blinka presented the Council's petition. Other speakers including Judge David Deininger of the Court of Appeals and three attorneys representing the Wisconsin Academy of Trial Lawyers also made presentations setting forth their concerns about the petition. In open conference after the hearing, the Supreme Court decided to remit the petition to the Council for further consideration on several matters that will be specified by the Court in a memo to the Council. Professor Wiegand said that when the matter returns to the Council a subcommittee should probably be appointed to review the Court's concerns. Professor Wiegand said she would gladly serve on that subcommittee.

Chairperson Stephens reported that Judge Mason graciously agreed to chair the Evidence and Civil Procedure Committee and she appointed Judge Mason to do so. Judge Mason commended Professor Wiegand for her fine work as chair of the committee and for the many projects she successfully shepherded through to completion.

Chairperson Stephens said that Attorney Betsy Abramson contacted her regarding the issue of guardian ad litem training in adult cases. Chairperson Stephens said that Attorney Abramson is interested in being on any subcommittee formed to review the issue and is drafting a petition for the Council's review.

### **IV. Discovery Directed to Children Proposal**

Gretchen Viney and Professor Wiegand presented the Evidence and Civil Procedure Committee's final proposal regarding discovery of children in civil cases. The Council began its discussion with proposed Section 804.05 regarding depositions upon oral examination. Professor Schultz wondered why the reference to Section 967.04 is added since that section deals with criminal cases. Gretchen Viney and Professor Wiegand explained that the intention is to cover situations in which depositions of children may be authorized and Section 967.04(7) allows the court to order a videotaped deposition of a child likely to be called as a witness in any type of case.

MOTION: Professor Schultz moved, seconded by Ruth Bachman, to amend proposed section 804.05(1) by adding the language "...except when deposing a child for discovery purposes S. 48.293 applies.

A discussion followed which resulted in a friendly amendment by Ruth Bachman, seconded by Judge Mason, to amend the note to section 804.05(1) after the phrase called as a witness by inserting the language "in a criminal prosecution or proceeding under Chapter 48 or 938...". Professor Schultz and Ruth Bachman agreed that this was a friendly amendment. The motion as amended PASSED UNANIMOUSLY.

Discussion continued on the proposal with Professor Wiegand explaining that proposed Section 804.005 Application of Section should be added so that those who review the statute for discovery in civil proceedings are alerted that discovery in children's proceedings are covered by Section 48.293 or 48.295. Discussion followed about whether to substitute the word "chapter" for the word "section" in the proposal both in the title and in the proposed amendment.

MOTION: Professor Wiegand moved, seconded by Ruth Bachman, to substitute the word "Chapter" for the word "Section" in proposed 804.005 both in the title and in the sentence. PASSED UNANIMOUSLY.

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Because of the press of time and the scheduling of two committees following the Council meeting, Chairperson Stephens said that further discussion of the discovery of children in civil cases proposal would continue at the December meeting. Chairperson Stephens asked all members to get their comments to Professor Wiegand before the meeting possible so that she and the other committee members can deal with prior to the meeting. Chairperson Stephens emphasized that she wanted complete the Council's review of this proposal at the December meeting.

## V. Appellate Rules Trailer Petition Proposal

Chairperson Stephens said that because of the time the trailer petition proposal would not be discussed but would need to be discussed and approved at the December Council meeting because of time restraints regarding when the proposal would become effective if adopted by the Court. Once again,

Chairperson

Stephens asked the Council to get any suggestions or comments to her or other members of the Appellate Issues Committee before the December meeting. She suggested that the only controversial item is number 14 on pages 8-9 of the proposed petition.

## **VI. Committee Reports (cont.)**

### **A. Appellate Issues**

Chairperson Stephens reported that the committee has a meeting schedule for meetings through February 15, 2002, including a meeting after the Council meeting today. The meeting today and in December will focus on the LRB drafts of the legislation requests and the 00-02 petition.

The January meeting agenda will include review of draft proposals on the disability of a justice and cross-petition for review issues. The committee will also identify written materials to be sent to the ad hoc pre-sentence investigation committee members for review and development of a PSI project work plan.

### **B. Criminal Procedure Committee**

Professor Schultz reported that the committee is meeting after the Council meeting today to continue the work is started last month in review of LRB reports on two of the chapters of the proposed criminal procedure rules changes. Professor Schultz also said that District Court Administrator Michael Neimon will be meeting with the committee in December regarding audio-visual proceedings.

### **C. Search Committee**

There was no report.

## **VII. Other Business**

There was no other business.

**VIII. Adjournment**

MOTION: Judge Wedemeyer moved, seconded by Timothy Vocke, to adjourn.

The Council adjourned at 11:26 a.m.

MINUTES OF THE MEETING OF THE JUDICIAL COUNCIL  
MADISON, WISCONSIN  
DECEMBER 21, 2001

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

MEMBERS PRESENT: Marla J. Stephens (Chair); Ruth Ann Bachman; Patricia Ballman; Justice N. Patrick Crooks; Matthew J. Frank; Michael J. Gableman; Honorable James Mason; J. Denis Moran; Honorable Gerald C. Nichol; Honorable Earl W. Schmidt; Professor David E. Schultz; Honorable Lee Wells; Professor Shirley A. Wiegand.

MEMBERS EXCUSED: Scott C. Baumbach; Senator Gary George; Jorge A. Gomez; Representative Mark D. Gundrum; Bruce Munson; Timothy Vocke; Honorable Ted E. Wedemeyer, Jr.; one vacancy.

OTHERS PRESENT: James C. Alexander; Dan Rossmiller; Gretchen Viney; Jason Westphal.

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

The meeting was called to order by Chairperson Marla Stephens at 9:30 a.m.

**II. Approval of Minutes of November 16, 2001, Meeting**

On page 2, the third sentence of the third paragraph under III., A. the word "on" should be changed to the word "is".

MOTION: Ruth Ann Bachman moved, seconded by Patricia Ballman, to approve the minutes as amended. PASSED UNANIMOUSLY.

**III. Welcome of New Member Michael Gableman**

Chairperson Stephens welcomed Michael Gableman to the Judicial Council.

Gableman is the district attorney for Ashland County and is the Governor's appointment as district attorney representative to the Council.

#### IV. Discovery Directed to Children Proposal

Professor Wiegand and Gretchen Viney led the continued discussion on the evidence and civil procedure committee's proposal regarding discovery related to children. Written changes reflecting the Judicial Council's actions at the November 16, 2001, meeting were provided to Council members.

The last sentence in Section 804.01 was changed to alert practitioners to the special Chapter 48 statutes concerning discovery for children. The changes in Sections 48.293(3m),(4m), and (5) are intended to address discovery to children without counsel and reflect current practice.

A discussion followed concerning the mandatory language in Section 48.293 (4m) that a judge be present at the taking of such a deposition.

MOTION: Ruth Bachman moved, seconded by Michael Gableman, that the provision be amended to add court commissioners at the discretion of the judge. PASSED 12-1 (Judge Mason voting against).

Chairperson Stephens had several questions and suggested changes for the committee. After a lengthy discussion the suggestions resulted in the following.

MOTION: Judge Nichol moved, seconded by Judge Wells, to amend proposed Section 48.293 as follows: (3m) after the word both in the second sentence add...if the court or the state public defender has not already appointed counsel or a guardian ad litem for the child. The court shall hear any objections by the child and by the child's guardian ad litem to the request for such discovery before ordering the discovery; 4m(a), after both, if the court or the state public defender has not already appointed counsel or a guardian ad litem for the child. The court shall hear any objections by the child and by the child's guardian ad litem to the request for such discovery before ordering the discovery; (5) by adding "the child, the

parties" after the phrase notice to; (8) adding the word person after the phrase this chapter, the; in the note adding the phrase "a person" after time in which a. PASSED 12-1 (Judge Mason voting against).

of The consensus of the Council was to have the committee incorporate all the suggested changes into a new written handout to be reviewed and discussed more fully at the January, 2002, Council meeting.

## V. Committee Reports

### A. Appellate Issues Committee

Chairperson Stephens reported that the trailer petition has been rescinded and will be reviewed again for re-submission by the committee.

Jim Alexander reported that the Council's petition for partial publication of Court of Appeals opinions was substantially denied. The only part of the petition that the Court adopted was to amend the reference to claim preclusion or issue preclusion where res judicata appears in present Section 809.23 (3). The Court was unanimous with its conclusion that partial publication procedure would be cumbersome and, given the experience in other states, was an idea whose time has passed. Alexander further reported that the Court is interested in reviewing the issue of citation of unpublished Court of Appeals opinions and will be seeking a proposal that can be subject to a public hearing sometime next year. It did not appear from the Court's discussions that the matter would be referred to the Council.

### B. Criminal Procedures Committee

Professor Schultz said that the committee is meeting today as it did last month. The committee continues to review the Legislative Reference Bureau draft material. The committee has completed looking at Chapter

967

and is moving on to Chapter 969 today. Also, District Court Administrator Michael Neimon is appearing before the committee today to discuss

video-

conferencing.

C. Evidence and Civil Procedure Committee

meeting

Judge Mason said that the committee will continue to work on the discovery of children proposal as addressed earlier in the Council

and also address sanctions petition issues. Judge Mason will contact Attorney Betsy Abramson on the issue of continuing legal education for guardian ad litem for adults and explain to her the committee's priorities.

D. Search Committee

Judge Nichol reported that he has contacted potential independent contractors, one whom is interested in the position on a part-time basis. Jim Alexander warned that with the dire budget forecast the amount of money available to an independent contractor may be far different in FY03 than it is in FY02. He suggested that it might be wise to await the introduction of the budget adjustment bill before going ahead with an independent contract.

**VI. Senator Risser Request**

Chairperson Stephens asked Professor Schultz and his committee to review Senator Risser's request and suggest a response to him. Professor Schultz agreed to do so.

**VII. Other Business**

There was no other business.

**VIII. Adjournment**

MOTION: Shirley Wiegand moved, seconded by Ruth Bachman, to adjourn.

The Council adjourned at 11:20 a.m.