

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
February 21, 2014

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

**MEMBERS PRESENT:** Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, George Burnett, Hon. Michael Fitzpatrick, William Gleisner, Dennis Myers, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Greg M. Weber, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Senator Glenn Grothman, Tracy K. Kuczenski, Devon Lee, Representative Jim Ott, Honorable Patience Roggensack, Brad Schimel, A. John Voelker, Honorable Jeffrey A. Wagner, Amy E. Wochos.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Sandy Lonergan and Cale Battles, Wisconsin State Bar.

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

Chair Bertz called the meeting to order at 9:50 a.m. Attorney Southwick noted that several members called her prior to the meeting to report that they were unable to attend due to poor travel conditions.

**II. Approval of January 17, 2014 Minutes**

The January 17, 2014 meeting minutes were approved by consensus without amendment.

**III. Discussion and/or Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure**

Attorney Southwick reported that following the previous Council meeting, Adam Gerol, President of the WDAA, and Council member Schimel met with Representative Ott and Senator Grothman. The WDAA requested additional time to provide comments and possibly propose amendments to the criminal procedure bill. With the current legislative session nearing its end, Rep. Ott and Sen. Grothman decided to put the criminal procedure bill on hold to give the WDAA additional time to prepare comments and/or draft proposed amendments. They will reintroduce the bill in the next legislative session.

Attorney Southwick asked the Council whether members are interested in working with the stakeholders who have raised objections to attempt to reach consensus. If so, she asked the Council to decide whether to undertake it as a whole or refer it to a committee. She indicated that the Council's Criminal Procedure Committee is willing to meet with stakeholders to attempt

to reach a compromise. Council member Wagner has offered to join the committee to work on the bill.

Council member Shriner thanked the workgroup that drafted the response to the objections and questions submitted by the Department of Justice. He felt the response submitted on behalf of the Council was superb. He voiced his continued support for the bill and supported the Council's continued work toward its adoption.

Council member Ptacek asked when the bill would be reintroduced. Attorney Southwick stated that the next legislative session begins in January 2015, and Representative Ott has expressed his intention to reintroduce it at the start of the session.

**MOTION:** Council member Shriner moved, seconded by Council member Pliskie, to empower the Council's Criminal Procedure Committee to meet with stakeholders to attempt to resolve the objections that have been raised to the criminal procedure bill. If the committee recommends any amendments to the bill, the recommendation will come to the full Council for discussion and approval. Motion approved unanimously.

Attorney Southwick noted that the committee will need to begin work immediately because any revisions that may be recommended to the bill will require redrafting by the Legislative Reference Bureau. She also noted that the Criminal Procedure Committee requested some additional members if it is tasked with working on the bill. Sandy Lonergan suggested that the State Bar's Criminal Law Section Board could recommend a defense attorney and a prosecutor to serve as *ad hoc* members.

#### **IV. Discussion/Action Regarding Presentence Investigation Report Bill**

Attorney Southwick reported that the bill proposed by Senator Grothman (AB 612 and SB 585) to permit crime victims access to certain portions of the presentence investigation (PSI) report, including the sentencing recommendation and victim information, is moving rapidly through the Legislature. Council members discussed the provision in AB 612 that requires the victim to keep information confidential.

Attorney Southwick recently received a request for the Legislative Reference Bureau to release a copy of the Judicial Council's 2013 presentence investigation report bill to Senator Darling's office. However, AB 612 is moving rapidly, so it appears unlikely that the bills will be consolidated. Council member Myers reported that he spoke with Sen. Darling's staff and they are considering the Council's bill for possible introduction in the next session.

Council member Fitzgerald expressed his concern with some provisions in the Council's 2013 draft presentence investigation report bill. Attorney Southwick stated that the Council has already approved the contents of the bill, but suggested that if AB 612 passes, the Council will need to revise its draft bill. The revision process would provide members with another opportunity to discuss the draft and offer suggestions for further changes.

## **V. Discussion and/or Action Regarding Structured Settlement Protection**

Attorney Southwick reported that she was contacted by a Legislative Council attorney. The Legislative Council is considering the request from Representative Ott and the Judicial Council to take up structured settlement protection as a study committee topic. Attorney Southwick met with the Legislative Council attorney and provided copies of the material and research compiled by the Judicial Council. She suggested that there is a strong chance that a study committee will be appointed. Attorney Southwick also provided her with some suggestions for potential study committee members.

## **VI. Committee Reports**

### **A. Appellate Procedure**

Attorney Southwick reported that the committee continues to wait for the Legislative Reference Bureau (LRB) to prepare a draft bill consolidating the rules regarding prisoner challenges to agency decisions into one subchapter of the code. The LRB stated that a draft would be ready for discussion at this month's meeting, but it is still not completed. As members await a draft, they have begun to study Rule 809.15, the record on appeal. Attorney Southwick prepared a 50-state survey to apprise members of how other jurisdictions have addressed the contents of the record and the process to supplement or correct it. Council member Shriner asked about the history of the project. Attorney Southwick reported that the Council received complaints that the content of the record varies from county to county, some records are incomplete, and the difficulty surrounding the procedure for supplementing the record. As the committee has begun looking at the issue, problems have also surfaced regarding electronic records.

### **B. Criminal Procedure**

Committee chair Blanchard reported that the committee continues to study the issue of law enforcement's use of GPS devices and other technology for geolocation tracking. The committee was drafting a white paper to provide information and guidance to the Legislature. However, a bill (2013 Assembly Bill 536 and 2013 Senate Bill 432) requiring a warrant for tracking via a "communications device" has been moving rapidly through the Legislature. The committee studied the bill and members believe it is likely to cause some confusion, resulting in unintended consequences. The committee expressed its willingness to draft additional legislation aimed at resolving some of the issues that have been identified.

The Council discussed some aspects of the bill that may cause confusion or result in appeals, including the requirement that the application for a warrant may only be made "upon the request of a district attorney or the attorney general." Council member Fitzpatrick confirmed that law enforcement officers currently seek this type of warrant without the apparent involvement of the district attorney or the attorney general's office.

Members discussed disclosure of location information by a service provider. Council member Gleisner suggested that the Stored Communications Act might also regulate disclosure of this type of information.

Members agreed by consensus that the Criminal Procedure Committee should present the Council with a recommendation for legislation to address issues identified by the committee. Attorney Southwick noted that a recommendation may be delayed by the committee's work on the criminal procedure bill.

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

Committee chair Shriner reported that at today's meeting, the committee will resume studying Wis. Stat. § 885.205 regarding privileged communications between students and deans and school psychologists. The committee also continues to discuss the expert privilege created in *Alt v. Cline*, 224 Wis.2d 72. The committee is considering whether a rule should be codified. The committee will also continue to study the issue of spoliation and preservation of evidence.

## **VI. Other Business**

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

Council member Blanchard reported that judicial officer and court-affiliated stakeholders were surveyed to establish current priorities and to develop a critical issues report.

Attorney Southwick noted that a supreme court rule change petition has been filed containing PPAC's recommendations to address limited scope representation. The notice for the March 21, 2014 public hearing was included in this month's Council materials.

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

There was no further information to report.

## **VII. Adjournment**

The Council adjourned at 10:45 a.m.