

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
March 15, 2013

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, Christine Rew Barden, Dennis Myers, Representative Jim Ott, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: William Gleisner, Senator Glenn Grothman, Tracy K. Kuczenski, Catherine A. La Fleur, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Jeffrey A. Wagner, Greg M. Weber.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Adam Gibbs, Sen. Grothman's office; Jeff Kassel, Department of Justice.

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:40 a.m.

II. Approval of February 15, 2013 Minutes

Council member Stephens suggested an addition on page 2, item V. to insert the phrase "and is required to" prior to "...provide the needed information."

MOTION: Council member Myers moved, seconded by Council member Barden, to approve the February 15, 2013 meeting minutes with the proposed amendment. Motion approved unanimously.

III. Discussion/Action Regarding Uniform Interstate Deposition and Discovery Act

At its September meeting, the Council agreed to provide a recommendation to the Wisconsin Uniform Law Commission regarding the Uniform Interstate Deposition and Discovery Act (UIDDA). The Act was referred to the Evidence & Civil Procedure Committee for further study. Attorney Southwick recently attended a meeting of the Wisconsin Uniform Law Commission. The commissioners requested that the Council provide a recommendation on the UIDDA prior to their fall meeting. Since the Evidence & Civil Procedure Committee is already working on two very large projects, it appears unlikely that the committee will have time to study UIDDA and prepare a recommendation prior to the Commission's fall meeting.

Attorney Southwick asked the Council how it would like to proceed. She suggested that the project can either remain assigned to the committee for further study and recommendation or

the Council as a whole can elect to take up the project and study the Act. The Council discussed the timing of the request. Council member Shriner, Chair of the Evidence & Civil Procedure Committee, offered to make the UIDDA project a priority for the committee. He believes the committee can study the Act and make a recommendation within the requested time frame. No further action was taken at this time.

IV. Discussion/Action Regarding Structured Settlements

At the previous meeting, Attorney Southwick circulated a brief memo regarding structured settlements. Because Wisconsin does not have any statutes regarding the sale of structured settlements, pleadings filed in Wisconsin cases involving the transfer of structured settlement payments rely on federal and non-Wisconsin state statutes. Wisconsin remains as one of only two states without a structured settlement protection act (SSPA) to govern the sale of payments. Members began to discuss the issue and raised a number of questions. They asked Attorney Southwick to conduct some additional research for further discussion and consideration at the next meeting.

Attorney Southwick distributed additional information regarding the transfer of structured settlement payments. She also responded to the questions raised at the previous meeting. Members had inquired about previous legislative efforts in this area. Although one article referenced a 2006 legislative effort, Attorney Southwick was unable to locate a bill. She found only 1999 Senate Bill 298, which failed to pass. The reason it did not pass was unclear.

Council member Weber previously requested additional information on the best interest standards adopted in California. Attorney Southwick distributed an article on the 2010 amendments to California's SSPA. Attorney Southwick also provided members with a copy of an article from the ABA Judges' Journal that explains the potential tax consequences associated with the transfer of structured settlement payments. If the party purchasing the payments fails to obtain court approval of the transfer, the purchaser can be subject to a 40% excise tax pursuant to IRC 5891.

MOTION: Council member Stephens moved, seconded by Council member Mary Wagner, to accept the sale of structured settlement payments as a project for further study and a recommendation. Motion approved with Council members Roggensack and Ott abstaining. The full Council agreed to study the issue and make a recommendation. Council member Ott suggested that the Council revise and update 1999 SB 298. He also offered to contact the bill's original author to obtain information regarding the bill's history.

V. Discussion/Action Regarding Proposed Amendments to the Rules of Criminal Procedure

Council member Schultz reported that the workgroup (Council members Schultz, Stephens and Weber) met and finished responding to the remaining questions and comments from the LRB drafters. The final issues involved technical questions and did not result in substantive changes to the bill draft. Attorney Southwick will communicate the requested revisions to the LRB drafters so that they can finalize the bill for introduction.

Sandy Lonergan reported that the State Bar Criminal Law Section is meeting in a few weeks to review and discuss the draft bill. She asked whether the Council would like to receive feedback. The Council indicated that they would like to receive suggestions regarding technical concerns. With regard to the broader policy issues, the original drafting committee included representatives from many different groups, including the State Bar Criminal Law Section. The policy issues were thoroughly vetted by the drafting committee and the current draft bill is a product of compromise. The Council has already discussed and approved the policy changes, but members are very willing to respond to any questions the section may have, including explaining why specific amendments were recommended. Council member Ott added that the Assembly judiciary committee will probably hold a public hearing on the bill. There will be plenty of opportunity to testify at that hearing, and it is possible to amend the bill at the committee level.

VI. Discussion and/or Action Regarding Presentence Investigation Report Bill

The Department of Administration previously circulated the presentence investigation report bill for fiscal estimates. Attorney Southwick reported that the Council is still waiting for fiscal estimates from two agencies. Council member Roggensack stated that the court has several matters before it involving presentence investigation reports so the Council may want to hold the bill until the court rules on those matters.

VII. Discussion and/or Action Regarding Wisconsin Rules of Evidence

A. Wis. Stat. § 906.09, Impeachment by Prior Conviction

Attorney Southwick distributed a written recommendation from the Evidence & Civil Procedure Committee in advance of the meeting. Council member Shriner summarized the additional revisions recommended by the committee. In particular, he noted that most of the suggestions received from Vice Chair Blanchard were adopted by the committee in its recommendation.

MOTION: Council member Stephens moved, seconded by Council member Schimel, to approve the recommendation contained in the memo from the Evidence & Civil Procedure Committee regarding amendments to s. 906.09, impeachment by prior conviction, dated January 18, 2013. Assistant Attorney General Jeff Kassel (attending on behalf of Council member Weber) explained that he was unfamiliar with the proposal regarding s. 906.09. He relayed Council member Weber's request that the vote be postponed or that Assistant Attorney General Kassel abstain from voting on this item. Members agreed that s. 906.09 was studied for a considerable length of time with participation from the Department of Justice so they were unwilling to postpone the vote. Motion approved with Council members Ott and Roggensack abstaining and Attorney Kassel present.

VII. Committee Reports

A. Appellate Procedure

Committee Chair Blanchard reported that the Appellate Procedure Committee continues to discuss proposed rules for protecting the identity of crime victims in appellate documents that are publically available via the internet. The committee will meet later today to continue discussing and drafting a proposed rule.

B. Criminal Procedure

The Criminal Procedure Committee met on March 6th. Committee Chair Stephens reported that the committee continues to discuss plea procedure and withdrawal. She anticipates that the committee will complete its study at the April meeting. The committee will then resume its study of procedural concerns related to police searches using GPS technology.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee continues to study *Alt v. Cline*, 224 Wis.2d 72, and whether to recommend codification of an expert privilege. The committee is also studying an amendment to Wisconsin's class action rule to bring it in line with its federal counterpart. Due to the expected absence of a number of members, the committee canceled its March 15th meeting.

IX. Other Business

A. PPAC Liaison's Report

There was no report.

B. Council Attorney's Report

1. 2013-2015 Executive Budget

Prior to the meeting, Attorney Southwick distributed copies of the 2013-2015 biennial budget proposed by the Governor. She reported that the Council's request to restore its full funding was denied. Attorney Southwick explained that the 2011-2013 biennial budget eliminated a significant portion of the Council's general purpose revenue (GPR) funding and created a funding source to be allocated from program revenue (PR) from the State Law Library or the Director of State Courts. In its 2013-2015 budget request, the Council sought restoration of full GPR funding. Unfortunately, under the proposed budget, the Council would continue to be dependent on the court to provide a significant portion of the Council's funding.

Council member Shriner noted that the court is experiencing severe budget cuts of its own, which could place the Council's continued funding in jeopardy. As the Council is currently funded under the executive budget proposal, the Council cannot maintain its one staff position without financial support from the court. It is imperative that the Council not be dependent on any other agency for its funding. Attorney Southwick encouraged Council members who know any members of the Joint Finance Committee to talk with them about resolving this issue.

2. Court Rules Regarding Motion Practice

At the previous meeting, Council member Shriener noted that some counties still do not have local rules governing motion practice. He suggested that the Council consider recommending minimal procedures, at least in civil cases. Council member Schultz stated that the Council previously worked on a project involving local rules, although he could not recall the outcome. Attorney Southwick offered to obtain more information regarding the Council's previous work.

Attorney Southwick reported that in 1993, the supreme court adopted a rule recommended by the Judicial Council requiring that local court rules must be consistent with state statutes and supreme court rules. The local rules must also be filed with the secretary of the local bar association, court administration, the state law library, and the State Bar. However, the rule does not require circuit courts to adopt local rules, so it does not address the issue previously raised by Council member Shiner.

Council member Mary Wagner suggested that it would be very difficult to achieve consistency in the local rules because counties often have very different opinions regarding local procedures. Council member Shriener agreed, but noted that the rules do not need to be standard. They can differ from circuit to circuit, but every county should adopt local court rules to address certain routine procedures, such as motion practice. He noted, for example, some courts may have informal or internal procedures that are well-known to attorneys who regularly appear in those courts, but that does not provide guidance to out-of-town counsel. He proposed a state-wide rule of civil procedure requiring all counties to adopt local rules on certain delineated subjects. The local rules must also be published to make them easily accessible to attorneys and parties. Council member Stephens noted that this project falls within the Council's statutory duty to make recommendations to improve court efficiency.

Members asked Attorney Southwick to set this item for discussion on a future agenda as a potential project for Council consideration.

X. Adjournment

The Council adjourned by consensus at 10:40 a.m.