

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
April 19, 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, William Gleisner, Tracy K. Kuczynski, Catherine A. La Fleur, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimmel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, Honorable Jeffrey A. Wagner, Honorable Mary K. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Christine Rew Barden, Senator Glenn Grothman, A. John Voelker.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Adam Gibbs, Sen. Grothman's office; Theresa Owens, Office of the Chief Justice.

I. Call to Order, Roll Call and Introductions

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

II. Approval of March 15, 2013 Minutes

Council member La Fleur suggested a typographical error on page 4, line 3, "publically." Council member Ptacek noted a typographical error on page 1, II., line 2, "need" should be "needed."

MOTION: Council member Myers moved, seconded by Council member La Fleur, to approve the March 15, 2013 meeting minutes as amended. Motion approved unanimously.

III. Appointment of a Nominating Committee

Chair Bertz asked for volunteers to serve on a nominating committee. Council members Gleisner, Wagner, and Stephens volunteered. Attorney Southwick explained that each year the nominating committee is tasked with nominating candidates to serve as chair and vice chair for the upcoming Council year. The nominating committee will announce its recommendation at the June meeting. She also explained that the June meeting is a special event at which the Council recognizes all of the ad hoc members who serve on the various committees, as well as an opportunity to honor departing members. Former Council and committee members, as well as other special guests are invited to attend a reception that is generally held in the Assembly Parlor prior the Council's regular June meeting. This year's reception begins at 9:30 a.m. on June 21st, followed by the regular Council meeting and the committee meetings, so members should expect that the meeting might run later than usual on that date.

IV. Discussion/Action Regarding Structured Settlements

At the previous meeting, members voted to accept the transfer of structured settlement payments as a new project for further study and a recommendation on a structured settlement protection act (SSPA). The Council agreed to undertake the study instead of referring it to one of the standing committees.

Attorney Southwick reported that she has scheduled Attorney Liz Nevitt to appear before the Council at next month's meeting to speak about the current process for obtaining court approval for the transfer of structured settlement payments. Attorney Nevitt frequently appears in these types of cases in circuit courts around the state. She has agreed to answer questions from members regarding her experience and the problems she has encountered. Members discussed whether they will be ready to hear from a speaker by the next meeting.

Council member White suggested that it would be helpful to also hear from a speaker with another perspective. She suggested that the Council arrange a presentation from a finance expert. Council member Weber noted that the California Attorney General's office has some involvement in the transfer of structured settlement payments. He suggested that Attorney Southwick contact the California Attorney General's office and invite someone who specializes in that area to conduct a presentation by conference call.

Council member Roggensack inquired as to how the transfer of structured settlement payments arises. Council member Ptacek explained that factoring companies in the business of purchasing structured settlements advertise heavily on television. The transfers end up in circuit court because an IRS regulation requires court approval of the transfer or the purchasing company must pay a 40% excise tax. Because Wisconsin does not have a statute governing the transfer, the federal regulations require the court to apply the law from the purchaser's jurisdiction so Wisconsin judges have to interpret and apply statutes from a variety of other states.

Members discussed generally how plaintiffs enter into structured settlement agreements. Council member La Fleur stated that she often recommends structured settlements for plaintiffs who are unsophisticated with money or who are minors at the time of settlement. They often also have serious injuries that will prevent them from being able to work in the future so a steady income stream is important. Council member Shriner asked whether structured settlement funds can be reached by creditors in bankruptcy. He suggested that if the plaintiff accrues a lot of debt, the funds might be at risk regardless of whether the plaintiff transfers the payments.

Council member Weber inquired as to whether the previous SSPA bill introduced in Wisconsin (1999 SB 298) received a public hearing. Attorney Southwick stated that it does not appear that it got that far in the process.

Council member White stated that she rarely approves transfers of structured settlement payments because the parties seldom present her with sufficient information to approve it. The plaintiff is generally unable to provide information about his or her medical, mental or financial

status. Council member Ptacek added that judges generally do not have sufficient information about how the purchaser calculated the discount rate. He has required plaintiffs to meet with a financial advisor prior to approving a transfer of their payments.

Council member Weber asked how these transfers are filed in circuit court. Council member Ptacek explained that they are usually filed as a civil declaratory judgment.

Council member Gleisner suggested that the plaintiff's attorney who negotiated the settlement should be involved in the transfer proceedings. Chair Bertz asked who would be responsible for compensating the attorney. Council member Schultz asked whether there are court findings regarding the original settlement. Members generally agreed that unless the plaintiff was a minor, the court does not have to approve the settlement so there are seldom any records. Council member Gleisner suggested making the plaintiff's attorney's file available to the court. Council member La Fleur expressed concerns regarding privileged information that is likely to be contained in the files. Attorney Southwick stated that California's SSPA provides that if the settlement was within five years of the transfer, notice must be sent to the plaintiff's attorney.

Attorney Southwick asked Council members to start thinking about some key provisions they would like to see in an SSPA. She asked members what type of test the court should conduct when asked to approve a transfer. For example, should it be a hardship test or should the standard be best interest? Hardship is much more difficult to demonstrate. The best interest test is a balancing test that requires consideration of a number of factors. Attorney Southwick added that the best interest test also requires the court to consider whether the structured settlement was intended to cover future medical or living expenses that the person would be otherwise unable to pay for without some type of public assistance. Council member Roggensack asked whether the IRS requires a hardship finding. Judicial members agreed that only court approval is required to avoid the excise tax.

Council member Wagner noted that the court is really being asked to determine the limits of a person's right to make their own decisions regarding their money. She suggested that the real issue is the small payment parties receive for their settlement funds, so that is the area that should be regulated. Council member Weber agreed and reiterated that he would like to hear from someone in the California Attorney General's office regarding what compels their involvement in a case. Council member Shriner suggested that the test should not be what is in the party's best interest. Instead, it should be whether the party selling the payments has received sufficient information and disclosures to make an informed decision regarding the transfer. Council member Ott suggested that a bill should contain specific requirements regarding what must be disclosed prior to the transfer.

Council member La Fleur asked about case law interpreting SSPA's in other jurisdictions. Attorney Southwick stated that she has not researched case law yet. Council member Gleisner noted a case involving California's SSPA (*321 Henderson Receivables Origination LLC v. Sioteco*, 173 Cal.App.4th 1059) in which a factoring company appealed a court's denial of petitions to approve a number of transfers. The appellate court reversed and remanded the case. Attorney Southwick asked when that case was decided. Council member

Gleisner stated 2009. She noted that California's SSPA was significantly amended in 2010. Council member Gleisner offered to conduct additional research on California law regarding structured settlements and the transfer of payments.

Council member Wagner expressed a preference for the best interest standard because it takes into account more information. Attorney Southwick pointed out examples of both the hardship standard and a best interest test. She noted that New York's best interest test is fairly simple, while California's is quite complex with 15 different factors for the court to consider, including whether the payee has received independent financial or legal advice. California's SSPA also requires the purchaser to pay up to \$1500 for the payee to obtain independent advice.

Council member Shriner observed that it is not the payee's money free and clear unless the payee gets court approval to transfer the funds, so he was less bothered by the court applying a standard such as best interest test. Council member Shriner asked why judicial approval was required in the IRS regulation. He suggested that the answer could help guide the Council in determining an appropriate test. Attorney Southwick stated that the excise tax and judicial approval requirement is intended to encourage states to adopt statutes to regulate this area and protect their citizens.

Council member Pliskie asked the judicial members whether most of these transfers involve structured settlements that were negotiated when the plaintiff was a minor. If so, he suggested the possibility of applying a different standard in matters where the plaintiff was an adult at the time the structured settlement was agreed upon. Council member White stated that the case file generally does not contain sufficient information for her to determine the party's age at the time the structured settlement was reached. Council member Ptacek said that sometimes he can tell based on the party's current age. Council member Wagner questioned what the basis would be to justify a different standard.

Council member Weber asked if CCAP has information regarding the number of cases filed seeking approval of a transfer of structured settlement payments. Council member Ptacek stated that the code used for these cases is a declaratory judgment. He is unaware of whether CCAP can track filings for this specific type of declaratory judgment. Council member Weber suggested that a requirement that the court consider a number of factors would probably also require a hearing. Depending on the frequency with which this type of case is filed, it could be time consuming for the circuit courts. Council member White stated that the circuit courts are already holding hearings on these cases. Attorney Southwick will ask CCAP for any information they may have available.

Council members discussed the next step in the process. Council member Ptacek suggested that it would be helpful to hear from an attorney who practices in this area. He suggested that the Council should also hear from speakers with other perspectives. Council member White suggested that it may be too soon in the process to hear from speakers.

Council member La Fleur asked how people find a financial or legal expert to provide independent professional advice. Members also questioned who is responsible for paying for the independent professional advice. Council member White did not think it would be a problem

because the court and the parties are able to resolve it in family law matters where they often require financial experts.

Council member Roggensack suggested postponing the speaker. She stated that she has no previous experience with this issue and may not be prepared to ask questions by the next meeting. Council member White suggested that there are only two meetings before the Council's summer break. If a speaker attends the next meeting, members may not remember the discussion when the Council resumes its meeting schedule in September. She suggested the Council postpone guest speakers until next fall. Council member Gleisner suggested referring the matter to the Evidence & Civil Procedure Committee because the committee has historically met over the summer.

Council member Wagner disagreed with referring the matter to a committee or postponing the speakers until fall. She proposed that the Council hear from the speaker and devote the next meeting to making a decision regarding the test and/or factors (hardship or best interest) that should be included in a proposed SSPA. Council member Stephens agreed that it would be helpful to hear from an attorney who practices in this area. She also supported hearing from a consumer advocate and the California Attorney General's office. She suggested that the Council proceed by hearing from a speaker or two at the next meeting.

MOTION: Council member Wagner moved, seconded by Council member Ptacek, to proceed with hearing from guest speaker Attorney Liz Nevitt at the May meeting, as well as a consumer advocate if Attorney Southwick is able to schedule someone to appear. Motion approved with Council members Roggensack, White and Shriner opposed.

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

Council members Ott and Schultz, Chair Bertz and Attorney Southwick met to discuss introduction of the draft criminal procedure bill. Council member Ott reported that the Governor's office has a few questions about the bill, but raised no significant issues. Council member Ott is meeting with the Attorney General's office next week to discuss the bill. He also recommended seeking feedback from the Wisconsin Counties Association. Council member Ott has suggested that the legislature appoint a joint committee to hold public hearings on the bill. Attorney Southwick will meet with the caucus chairs of the majority and minority party in both houses to discuss the process, as well as the bill's content. Council member Ott is hopeful that at least one house will pass the bill this fall.

The criminal procedure workgroup (Council members Schultz, Stephens and Weber) met and completed its review and response to the LRB notes that were embedded in the most recent bill draft. Attorney Southwick sent those responses to the Legislative Reference Bureau with a request to prepare the bill for introduction. Council member Ott offered to contact the LRB to encourage them to finalize the bill as quickly as possible.

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 received an estimate from the district attorneys stating that while they believe sentencing hearings will be delayed due to defense counsel's failure to timely meet with defendants, most responders stated that the bill will have no fiscal impact on their offices. However, due to mixed responses, they concluded that the fiscal impact of the bill is indeterminate. The Council is still waiting for a fiscal estimate from the courts.

Prior to the meeting, Attorney Southwick distributed a copy of the supreme court's recent decision in *State v. Buchanan*, 2013 WL 1405866. The case highlights some of the problems with current law that will be clarified by the proposed bill the Council has drafted. Council member Roggensack stated that the supreme court may have another case before it involving presentence investigation reports.

VII. Committee Reports

A. Appellate Procedure

Committee Chair Blanchard reported that the committee continues to discuss a rule for identifying crime victims in appellate briefs and opinions. The committee will meet later today to continue discussing and drafting a proposed rule.

B. Criminal Procedure

Committee Chair Stephens reported that the committee continues to discuss plea procedure and withdrawal. She anticipates that the committee will complete its study by the end of the Council year. The committee is anxious to begin its next project: studying procedural concerns related to police searches using GPS technology.

Council member Shriner asked whether the Council is likely to propose procedural rules in response to the U.S. Supreme Court's recent ruling regarding blood tests in cases of suspected drunk driving. Members generally did not support it as an appropriate project for future discussion.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the committee will begin discussing the Uniform Interstate Deposition and Discovery Act at its meeting later today. The committee also 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.

VIII. Other Business

A. PPAC Liaison's Report

Council member Wagner reported that PPAC met and discussed limited scope representation and approved proposed rules. They also discussed the ability of attorneys to mediate and reduce the mediation agreement to writing. Some members believe the practice violates ethics rules if the parties are unrepresented because the lawyer is in a position of becoming an advocate for two adverse parties. PPAC also discussed the court's budget, court security, effective justice strategies and treatment courts.

B. Council Attorney's Report

1. 2013-2015 Executive Budget

Attorney Southwick reported that the Joint Finance Committee has not acted on any agency budgets yet. The committee will begin discussing agency budgets next week. Adam Gibbs stated that he will forward a copy of the committee's schedule to Attorney Southwick so that she can update the Council. Attorney Southwick encouraged any Council members who know any members of the Joint Finance Committee to talk with them about the Council's budget and the need to restore the Council's full funding from general program revenue (GPR). (Currently, the Director of State Courts office and the State Law Library are responsible for allocating funds to cover over 40% of the Council's budget.) Attorney Southwick will distribute a list of Joint Finance Committee members to the Council.

IX. Adjournment

The Council adjourned by consensus at 11:00 a.m.