

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
May 17, 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, William Gleisner, Catherine A. La Fleur, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Jeffrey A. Wagner, Honorable Mary K. Wagner, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Senator Glenn Grothman, Tracy K. Kuczenski, Greg M. Weber.

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

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

Chair Bertz called the meeting to order at 9:35 a.m.

**II. Approval of April 19, 2013 Minutes**

Council member Roggensack requested an amendment on page 6, second paragraph, to revise “supreme court still has...” to read “supreme court may have...”

**MOTION:** Council member Myers moved, seconded by Council member La Fleur, to approve the April 19, 2013 meeting minutes as amended. Motion approved unanimously.

**III. Discussion and/or Action Regarding Committee Recommendation Concerning Plea Procedure When the Court Does Not Intend to Follow a Sentencing Recommendation**

Prior to the meeting, Attorney Southwick distributed a written recommendation from the Criminal Procedure Committee. Committee Chair Stephens explained that after studying the plea procedure and plea withdrawal rules and discussing a number of options, the committee was unable to reach consensus to recommend an amendment to the current rules.

Members discussed some of the issues raised in the committee's recommendation. Some members agreed that when a judge significantly exceeds a sentencing recommendation, that action often prompts the defendant to look for grounds to appeal. Some members also expressed concern that allowing plea withdrawal would increase the workload at the circuit court level by making plea hearings more complex or by increasing the number of cases that go to trial.

Attorney Southwick reported that Judge Brown, Chief Judge of the Wisconsin Court of Appeals, extended his sincere thanks to the members of the committee for undertaking the study.

MOTION: Council member Shriner moved, seconded by Council member Wagner, to accept the recommendation from the Criminal Procedure Committee. Motion approved with Council members Roggensack and Ott abstaining.

#### **IV. Discussion/Action Regarding Structured Settlements**

The Council previously agreed to study and make a recommendation on a structured settlement protection act (SSPA). Wisconsin is one of only two states that have not adopted an SSPA.

Prior to the meeting, Attorney Southwick distributed an extensive research memorandum prepared by Council member Gleisner regarding California's laws regulating the transfer of structured settlement payments.

Guest speaker Liz Nevitt attended the meeting to speak with the Council about the current process for obtaining court approval for the transfer of structured settlement payments. Attorney Nevitt regularly represented companies that purchase structured settlement payments and she has appeared in courts throughout Wisconsin. She explained that pursuant to the Internal Revenue Code, a judge is required to approve the transfer to avoid the payment of a large excise tax.

Attorney Nevitt explained the procedure, which she usually initiates by filing a joint petition because individuals who are selling their payments are rarely represented by legal counsel. Wisconsin does not have a statute regarding the transfer of structured settlement payments, so she includes with the petition a copy of both the applicable federal tax law and the SSPA from the state where the purchasing company is domiciled. (Federal law provides that courts can apply either the state law from the jurisdiction where the seller is domiciled or the law from the jurisdiction where the purchaser or the entity issuing the funding asset for the structured settlement is domiciled or has its principal place of business.) The petition also includes the seller's application to the purchasing company, which generally contains the reason the individual is seeking to sell his or her structured settlement payments, as well as any disclosure statements or other information required under the applicable state statute. Attorney Nevitt clarified that she is not involved in the application process and does not participate in negotiating the terms of the sale. Her role is solely to obtain court approval of the transaction.

After the petition is filed in circuit court, Attorney Nevitt schedules a hearing. She explained that the hearings can vary widely from county to county. Also, individual judges often have different criteria that they consider in determining whether or not to approve the transfer. Some parties demonstrate very good reasons for the transfer of their payments, such as to pay for medical care. Those transfers are typically approved without hesitation by the court. However, not all transfers are approved. Some transfers are denied because they are not in the seller's best interest either due to the terms of the transfer or because the seller failed to articulate a good reason for the transfer. She stated that regardless of whether the applicable statute specifically

requires the court to consider a list of factors to determine best interest, most judges do it. However, she noted that in her experience, at least two judges have questioned whether Wisconsin judges even have jurisdiction to hear these cases because Wisconsin does not have a state statute that allows it. Those judges have refused to approve these types of transfers. She has also encountered judges who refuse to comply with the federal requirement that the court find that the transfer does not contravene any federal or state statute or the order of any court or responsible administrative authority. Council member La Fleur asked whether Attorney Nevitt has appealed a court's refusal to approve a transfer. She stated that she has not appealed any of these cases.

Attorney Nevitt stated that the discount rates in these types of transfers generally range from 50-80% of present value. However, in some cases the discounts are so extreme that the court denies the transfer for public policy reasons. The seller is provided a disclosure statement that details the total amount of payments and the present value.

Members discussed whether a statute should contain minimum requirements. Council member Gleisner asked Attorney Nevitt's opinion on the California SSPA. She did not indicate any problems with it, but suggested that it may create more work for the Attorney General's office. She suggested that the factors for the court to consider in determining best interest reflect what most judges are already considering on an informal basis so it would not really change the current process. Members noted that the California SSPA contains the provision that requires the purchaser to pay up to \$1500 toward the provision of professional legal or financial advice for the seller. Attorney Nevitt stated that many of her clients are willing to pay for legal services to the seller. However, if the expenses increase, then the companies will likely pay less for the transfer.

Council member Ptacek asked Attorney Nevitt's opinion regarding which test should be used by the court to decide whether to approve the transfer: a best interest test or a hardship test. She stated that most state statutes use a best interest test. Some states, such as Michigan, use a hardship test but it can be very difficult to meet it. Some judges express concern when asked to approve a decision made by a competent adult. Council member La Fleur asked what evidence is offered to demonstrate best interest. Attorney Nevitt stated that it is generally up to the party seeking to sell their payments to provide the court with that information. It can be explained in writing in their application or they can testify at the hearing. She added that if the funds are going to pay bills or past due child support, some judges instruct that the funds be paid directly to the creditor and any remainder can go to the seller.

The Council discussed cases involving dependants and beneficiaries. Attorney Nevitt stated that beneficiaries receive notice but dependents do not get notice of the transfer or payments. She also stated that a Guardian ad Litem (GAL) is not appointed because minor dependants are not parties to the transfer. The Council discussed the transfer of payments by a minor and whether it should be prohibited until the minor reaches the age of majority, absent hardship or other standard. Attorney Nevitt explained that most of the structured settlement transfers that she has handled provide that the payments start when the minor reaches the age of 18 so there is generally no guardian involved. If a child needs continuing care, there is generally a lump sum settlement awarded to the parents to care for the child until the structured settlement

payments begin. The Council discussed whether a statute should require that in cases involving a structured settlement for a minor, the original settlement agreement must be provided to the court. Members generally agreed that it could be difficult to obtain a copy of the original settlement agreement, especially if the case settled many years ago or if it was litigated in another state.

Attorney Nevitt has handled cases in which the payee sought independent professional advice but she is unaware of how payees locate someone to provide the advice. She suggested that some legal clinics may assist with that type of issue. She also stated that some payees are represented by a lawyer.

Attorney Nevitt stated that in her experience, most individuals who seek to sell their settlement payments have jobs or are able to work. She seldom sees a payee who is dependent on public assistance or who is likely become dependent without the structured settlement payments. She provided an example in which a payee sold some structured settlement payments and as a result, became dependent on social security. When the payee later sought to sell additional payments, the judge considered her demonstrated inability to support herself without the structured settlement payments and denied the transfer.

Attorney Nevitt identified a gap in current law. Because Wisconsin does not have a SSPA, Wisconsin courts have to apply the law from the state where the annuity issuer or the underlying liability carrier is domiciled, pursuant to 26 U.S.C. § 5891. If both companies are domiciled in Wisconsin, then the Wisconsin payee cannot sell his or her payments without the transfer being subject to a 40% tax. Council member Schultz also observed that without a Wisconsin statute, a judge could hear three different cases and be required to apply a different state statute (and possibly a different test) in each case, depending on the domicile of the purchasing company. Attorney Nevitt agreed that it would be a good idea for Wisconsin to adopt an SSPA. It would make it easier for Wisconsin judges to have Wisconsin law to follow instead of having to interpret various laws from other states.

Council member Shriner proposed that the content of a state statute regulating the transfer of structured settlement payments presents many policy questions. It is not simply a matter of procedure. He suggested that the Council should recommend that Wisconsin adopt a statute, but the content should be decided by the legislature. Council member Stephens suggested that a Legislative Council special study committee might be in the best position to draft legislation to address this issue. On the other hand, she noted that a judge brought this issue to the Council because it presents a problem that judges are being asked to address with no statutory guidance. Legislative Council study committees often lack judicial participation so she suggested that the Judicial Council might also be a good position to draft proposed legislation. Council member Shriner suggested that perhaps the Council could offer to review legislation drafted by a Legislative Council special study committee and offer comments.

**MOTION:** Council member White moved, seconded by Council member Pliskie, that the Council refer the issue to Rep. Ott to make a request that the Legislative Council appoint a special study committee to make recommendations and draft legislation to address the issue. Motion approved unanimously.

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

Attorney Southwick reported that she has been scheduling meetings with the caucus chairs of the majority and minority party in both houses to discuss the bill and its introduction. Council members Ott and Schimel met with Council member Grothman (in his capacity as chair of the senate judiciary committee) to discuss the bill's introduction and committee review.

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

There was no further discussion or action regarding this item.

## **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. Today's meeting has been canceled due to a lack of a quorum, but the committee will continue discussing and drafting a proposed rule at next month's meeting.

### **B. Criminal Procedure**

Committee Chair Stephens reported that the committee will begin its next project: studying procedural concerns related to police searches using GPS technology.

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

Committee Chair Shriner reported that the committee will continue to discuss 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 Voelker reported that PPAC has not met since the Council's previous report.

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

#### **1. 2013-2015 Executive Budget**

Attorney Southwick reported that at a recent Joint Finance Committee executive session, Rep. Richards authored a motion to restore \$58,000 GPR and 0.50 GPR position annually for the Judicial Council. Unfortunately, his motion failed on a party line vote (4-12). Joint Finance Committee Co-Chair Nygren offered another motion to exempt the Judicial Council from the standard budget adjustments. The motion passed, and will result in the Council having an additional \$6,100 in its biennial operating budget.

## **2. Rules Regarding Inadvertent Disclosure of Privileged Information**

Judge Sankovitz, Judge Leineweber and Attorney Southwick authored an article for the State Bar on the new rules regarding inadvertent disclosure of privileged information that were drafted by the Council and adopted by the Wisconsin Supreme Court, effective January 1, 2013. Attorney Southwick was also invited to conduct a webcast continuing legal education seminar for the State Bar. Judge Leineweber, Judge Sankovitz and Council member Gleisner will assist her with that project.

## **IX. Adjournment**

The Council adjourned by consensus at 11:15 a.m.