

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 19, 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, Hon. Michael Fitzpatrick, William Gleisner, Jill Kastner, Devon Lee, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Honorable Jeffrey A. Wagner, Greg M. Weber, Honorable Maxine A. White, Amy E. Wochos, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Senator Glenn Grothman, Tracy K. Kuczenski, Dennis Myers, Brad Schimel.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Nancy Rottier, Director of State Court's office; Adam Plotkin, State Public Defender's office; Rep. Gary Hebl; Mike Murray, Office of Rep. Hebl.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. Members introduced themselves and welcomed new members Jill Kastner and Justice Annette Ziegler.

II. Approval of June 20, 2014 Minutes

MOTION: Council member Wagner moved, seconded by Council member Pliskie, to approve the June 20, 2014 minutes. Minutes were approved without amendment, with Council member Ziegler abstaining.

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

Prior to the meeting, Attorney Southwick circulated a copy of the Criminal Procedure Committee's workplan containing all the items that the committee agreed to discuss at its numerous meetings over the summer, as well as the action taken by the committee with regard to each item. For further background on the committee's work, she also provided copies of all the committee meeting minutes. To aid the Council in its review of the committee's recommendations, Attorney Southwick circulated a memo, dated September 17, 2014, explaining each amendment that the committee recommended regarding 2013 Assembly Bill 383.

Vice Chair Blanchard explained that the committee was tasked with working with interested stakeholders in the criminal justice system to try to resolve some concerns that were raised regarding some of the proposed amendments in AB 383. Prior to beginning its work,

stakeholders and committee members were asked to identify all provisions in AB 383 or current law that they felt needed additional study or consideration. Over the course of the summer, the committee discussed each item in the workplan. The committee recommended no changes to most of the provisions in the workplan. However, the committee recommended several sections for further amendment. Vice Chair Blanchard noted that the committee often arrived at its recommendations unanimously, although there were some provisions on which members remained divided. If a majority of the committee was unable to agree on an amendment, the committee recommended no change to the language in AB 383.

Council member Weber explained that the Department of Justice (DOJ) recently noted an additional concern that was not included in the committee's workplan and was not discussed by the committee. He explained that under current law, Wis. Stat. § 968.255 contains criminal penalties for conducting unlawful strip searches, but it does not contain a provision calling for suppression as a remedy for a violation of the statute. As modified in AB 383, proposed s. 968.585 (strip searches) creates a new subsection (4m), which reads as follows: "Any evidence obtained by a strip search in violation of sub. (2) or (3) is not admissible as evidence at trial." He suggested that *State v. Minett*, 2014 WI App 40, 353 Wis. 2d 484, 846 N.W.2d 831, concluded that suppression of evidence is not a remedy for a violation of current s. 968.255. If proposed s. 968.585(4m) is intended to provide a new statutory rule of suppression, DOJ will oppose it.

Attorney Southwick distributed a copy of *State v. Minett* to all Council members. Council member Shriner inquired as to whether any other statutes contain mandatory suppression as a remedy. Council member Weber responded that the supreme court created a rule of suppression for a statutory violation in *State v. Popenhagen*, 2008 WI 55, 309 Wis.2d 601, 749 N.W.2d 611.¹

Council member Schultz noted that suppression as a remedy was not in the original draft bill, but apparently, it was added later. He offered to review his records to attempt to determine when and why suppression was added as a remedy.

Council member Lee objected to the Council taking any action on the provision raised by Council member Weber because it was not part of the Criminal Procedure Committee's workplan and the committee has not had an opportunity to study it and make a recommendation. Council member Weber was not opposed to the Council delaying action on it.

Council member Fitzpatrick inquired about the recommended amendment to proposed s. 968.705, subpoena for documents, in AB 383. He noted that as drafted, the request for the subpoena and supporting documents may not be filed with the clerk until the subpoena is returned. He expressed concern about that procedure, including who is responsible for those documents prior to filing them with the clerk.

¹ In *Popenhagen*, the supreme court held that "the circuit court has discretion to suppress or allow evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute." 2008 WI 55, ¶ 64.

Members discussed the procedures under the other subpoena and search warrant provisions. Attorney Southwick noted that DOJ drafted the revised language in proposed s. 968.705, and it is modeled on amendments to current s. 968.375. (Sec. 968.375 contains the same language regarding secrecy and prohibiting filing with the clerk until after the subpoena has been executed and returned.) DOJ reported that the process has been working well under s. 968.375, so it recommended the same procedure for proposed s. 968.705. Attorney Southwick noted that the search warrant provisions also contain the same language in question.

Council member Ziegler suggested that the actual procedures might vary from county to county. She suggested obtaining more information from circuit court judges at the upcoming Judicial Conference. Members generally agreed that it would be a good idea to determine best practices and attempt to achieve some uniformity in the statutes and across the state. However, members agreed that this should be done as a separate project. It will take time to study the problem, and members were generally opposed to delaying reintroduction of the criminal procedure bill. Members agreed by consensus that all the provisions regarding subpoenas and search warrant should be studied in the near future to insure best practices and consistency.

Members discussed the recommended amendments to proposed s. 972.23(2), deliberations by an alternate juror, contained in AB 383. The additional amendment adds guidance regarding when a judge may replace a deliberating juror with a retained alternate.

Council member Shriner asked about the pros and cons of retaining current law regarding preliminary hearings, and he inquired how the committee reached its recommendation to retain current law. Vice Chair Blanchard explained that the committee held a public hearing and heard testimony from a number of attorneys, both prosecutors and defense attorneys. No one spoke in support of eliminating preliminary hearings. Since the law was amended to allow hearsay testimony, witnesses appear to be much less likely to be subjected to lengthy waiting times for a hearing that may ultimately be waived by the defendant at the last minute. Attorney Southwick added that the Judicial Council previously authorized the Criminal Procedure Committee to continue studying the issue of preliminary hearings. While there was no support for eliminating preliminary hearings, some speakers and committee members spoke in support of further amendments to the process because some view it as having relatively little value in its current state.

Attorney Southwick noted that the committee recommended three specific areas for further study: (1) preliminary hearings; (2) discovery depositions; and (3) search warrants and interception of electronic communication. The need for further study and amendments in these three areas is primarily due to changes in technology. The committee identified these areas for updates to keep pace with technological advances or to take advantage of processes that might be significantly improved by using technology. She noted that the committee recommended that those three areas should be studied separately because a comprehensive study will likely take quite a bit of time and the committee does not want to delay reintroduction of the bill.

Vice Chair Blanchard thanked all the committee members and extended his appreciation to Representative Jim Ott and Representative Gary Hebl for their participation and guidance with regard to the legislative process.

Attorney Southwick stated that the Criminal Procedure Committee has asked the Judicial Council to approve its recommendations contained in the September 17, 2014 memo, and direct the Legislative Reference Bureau to make the approved amendments to AB 383 prior to the bill's reintroduction in the upcoming legislative session. She noted that the LRB recently completed the amendments to restore preliminary examinations (as approved at the Council's June 20, 2014 meeting), although the revised draft contains many questions from the drafting attorney.

Council member Gleisner asked Council member Schultz (chair of the committee that drafted the original criminal procedure bill) to share his opinion regarding the current committee's recommendations to amend the bill. Council member Schultz indicated that he has mixed feelings regarding the various recommendations, but he favors moving the bill forward. In particular, Council member Schultz does not support the numbering system used by LRB. However, after the committee met with the LRB drafting attorney and further discussed the issue, there appears to be no good way to fix it. He also noted that further amendments to the bill will likely result in many new questions from the LRB drafter. He raised concerns about the Council's limited resources because the Council and its staff person will probably have to spend a significant amount of time reviewing the revised bill and responding to drafting questions. However, he agreed that many of the changes recommended by the committee will improve the bill.

MOTION: Council member Shriner moved, seconded by Council member Pliskie, to approve the recommendations from the Criminal Procedure Committee, as contained in the September 17, 2014 memo, and forward them on to the Legislative Reference Bureau with a request to amend Assembly Bill 383 for reintroduction in January. Motion approved, with Greg Weber opposed and Council members Ott and Ziegler abstaining.

Members discussed whether to take action on the issue raised by DOJ regarding proposed s. 968.585(4m), suppression as a remedy for a violation of the statute regarding strip searches. Council member Ott noted that issues that are unresolved at this stage can be resolved by the Legislature with an amendment to the bill. Attorney Southwick stated that the Council can approve the Criminal Procedure Committee's recommendations and refer the bill back to the LRB for redrafting while it looks at additional changes to s. 968.585(4m), or it can refer the matter back to the Criminal Procedure Committee for a recommendation. Council member Shriner suggested that it is a policy decision, so it may be best to leave it to the Legislature to make a decision regarding remedies. The Council took no action with regard to s. 968.585(4m).

Members questioned how the Council should handle questions from the LRB drafting attorney that might arise during redrafting. Attorney Southwick recommended that the Council postpone making a decision regarding the procedure for reviewing the questions and revisions until after the amendments are complete and she is able to determine how many new issues and questions will need to be addressed. The Council has previously appointed a subcommittee to respond to questions, with any substantive issues to be addressed by the Council as a whole.

IV. Discussion and/or Action Regarding Judicial Council's 2015-2017 Budget Request and Budget Procedure

Prior to the meeting, Attorney Southwick circulated copies of the Council's 2015-17 budget request. The Council's Executive Committee preliminarily approved the request. Attorney Southwick explained that the Council is seeking a change to reallocate \$58,000 in program revenue (PR) transferred from the Director of State Courts and/or the State Law Library to \$52,000 received from general purpose revenue (GPR). The reallocation would mean the Council would no longer have to rely on funding from another agency (the court) to maintain its only staff position. The budget request would essentially eliminate funding from the court and restore the Council's full funding from GPR in the same manner that other state agencies are funded. The supreme court has specifically requested that the Council seek restoration of its funding from GPR.

Attorney Southwick explained that the court has had significant funding problems and has been unable to fund the Council for the full \$58,000 PR. The Council has made the necessary short-term cuts to its budget, but cannot continue to operate at the reduced level. To meet the short-term reductions in the Council's funding, Attorney Southwick eliminated funding for office supplies, technology, and ad hoc committee members' travel expenses. However, eliminating funding for these crucial areas is taking its toll. The Council is running out of necessary office supplies. The Council's two computers are past the age at which they should have been replaced, and they are operating on outdated software that is increasingly incompatible with more current software. The Council relies on attorneys and judges with specialized knowledge in various subject areas to round out the membership of its standing committee. Eliminating travel expenses (mileage and parking) for ad hoc committee members makes it increasingly more difficult to retain and attract those volunteers. It also makes it more difficult to attract ad hoc committee members from different geographic regions from around the state.

Attorney Southwick explained that the PR funding from the court is misleading in the budget request (\$44,400) because it does not include travel reimbursements to the judicial members of the Council. The court has been reimbursing those members directly, so that significant cost is not reflected in the Council's PR funding. If the Council's request for full GPR funding is approved, the Council would resume reimbursements for the judicial members' travel. The difference between the current PR funding and the requested GPR funding (approximately \$7600) reflects the sum needed to reimburse travel expenses for the judicial members and the ad hoc committee members, fund the purchase of two new computers with updated software, and purchase office supplies.

Council member Gleisner asked whether the court and the Legislature support the Council's funding request. With regard to the court, Attorney Southwick stated that the court specifically requested that the Council seek to restore its full funding from GPR and remove the PR funding from the director of state court's office and law library. With regard to the Legislature, Council member Ott stated that it would ultimately be up to the Judicial Council to convince the Joint Finance Committee that the Council's value warrants full funding from GPR. He suggested that passage of the bill amending the criminal procedure code and passage of a bill regarding the transfer of structured settlement payments could help support the Council's request for full funding.

MOTION: Council member White moved, seconded by Council member Wagner, to approve the 2015-2017 budget request as presented. Motion approved, with Council members Ott and Ziegler abstaining.

V. Discussion and/or Action Regarding Supreme Court Rule Change Petition 13-16, Uniform Interstate Deposition and Discovery Act

On November 15, 2013, the Judicial Council filed supreme court rule change petition 13-16, recommending adoption of the Uniform Interstate Deposition and Discovery Act (UIDDA) with slight modifications to conform to current Wisconsin law and practice. Council member Shriner summarized the petition and explained the benefits of the UIDDA as compared to current Wisconsin law. Council member Gleisner provided an example in which a judge in a foreign state that has adopted the UIDDA refused to allow a Wisconsin attorney to use the UIDDA procedures to take a deposition in the foreign state because Wisconsin has not adopted the UIDDA. Attorney Southwick noted that over 30 states have already adopted the UIDDA, and some states have included a reciprocity requirement.

The supreme court set the Council's petition for a public hearing on September 29, 2014. The court also sent the Council a letter containing a number of questions regarding the petition. Committee Chair Shriner and Attorney Southwick drafted responses. The Evidence & Civil Procedure Committee held an extra meeting over the summer to finalize and approve the responses prior to their submission to the court. The only other written comment submitted to the court in response to the Council's petition is from the Uniform Law Commission (ULC). The responses from the ULC appear to be consistent with the responses prepared by the Evidence & Civil Procedure Committee.

Council member Shriner and Attorney Southwick will present the rule petition to the supreme court at the public hearing on September 29, 2014 at 9:45 a.m.

VI. Discussion and/or Action Regarding Supreme Court Rule Change Petition 14-01, Victim Identity in Appellate Briefs and Opinions

On January 21, 2014, the Judicial Council filed supreme court rule change petition 14-01, recommending adoption of a rule prohibiting the use of crime victims' names in appellate briefs and opinions.

Attorney Southwick reported that she and Council member Blanchard will present the rule petition to the supreme court at a public hearing on September 22, 2014 at 9:45 a.m. The Department of Justice, the State Bar Appellate Practice Section, and several victims' advocates submitted written comments, and will appear at the hearing to speak in support of the proposed rule. No organizations or individuals have submitted any written comments in opposition to the proposal, and Attorney Southwick is unaware of any opposition anticipated at the hearing.

Attorney Southwick explained that the proposed rule prohibits identification of a victim "by any part of his or her name but may identify a victim by one or more initials or other

appropriate pseudonym.” The State Bar Appellate Practice Section has proposed modifying the provision to read, “..or other appropriate designation” instead of using the term “pseudonym” because most dictionaries define “pseudonym” as “a fictitious name.” Attorney Southwick explained that the committee selected the term “pseudonym” deliberately because members wanted the rule to provide specific statutory authority to allow the use of a fictitious name. There is nothing in current law or the proposed rule that would prohibit the use of more generic identifiers such as “victim,” “complainant,” or child.” Unfortunately, the Appellate Practice Section did not convey its suggestion to the Judicial Council or its Appellate Procedure Committee, so there was no opportunity to discuss the stated concern prior to the public hearing. At the public hearing, Attorney Southwick will present the Council’s reasons for opposing the change suggested by the State Bar section. Council member Weber stated that he will appear at the public hearing on behalf of DOJ, and he agrees with the Council’s position.

VII. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to study Rule 809.15, the record on appeal. Members are considering issues such as electronic exhibits, supplementing the record, and the clerk's discretion in determining the contents of the record.

The committee will also continue to work on the issue of prisoner challenges to agency decisions. The Legislative Reference Bureau (LRB) has completed a preliminary draft bill consolidating the rules into one subchapter of the code. The committee has begun discussing revisions to the draft bill.

B. Criminal Procedure

Committee Chair Blanchard reported that the committee will begin a new project at its next meeting. It will study the Uniform Electronic Recordation of Custodial Interrogations Act and recommend whether Wisconsin should update its statutes by adopting the Uniform Act.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to work on a draft of a proposed rule to codify *Alt v. Cline*, 224 Wis.2d 72, and its expert privilege rule.

The committee will also resume its work on the class action statute, a previous project that was tabled while the committee completed the Rules of Evidence project. The committee also has pending projects involving items of cost and service of subpoenas.

VII. Other Business

A. Legislative Council Study Committee Report: Transfer of Structured Settlement Payments

Council member Ott reported that the study committee reviewing the transfer of structured settlement payments began meeting over the summer. Attorney Southwick presented at the first meeting. He anticipates that the committee will approve a draft bill in the next few months and may ask the Council to review it prior to introduction in the upcoming legislative session.

B. PPAC Liaison's Report

Council member Ptacek reported that PPAC has been focusing on the court's 2015-17 budget submission. PPAC also discussed electronic filing in the circuit courts, and redaction of confidential information in documents that are filed electronically.

C. Council Attorney's Report

Attorney Southwick reported that she is in the process of negotiating a new lease for the Council office. She has tentatively reached an agreement that will reduce the Council's monthly rent, but a final lease has not been executed yet.

VIII. Adjournment

The Council adjourned at 11:25 a.m.