

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 19, 2012

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, Tracy K. Kuczenski, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Honorable Mary K. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Allan M. Foeckler, Catherine A. La Fleur, Honorable Mark Mangerson, Representative Jim Ott, Senator Fred Risser, Marla J. Stephens, A. John Voelker.

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

I. Call to Order, Roll Call and Introductions

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

II. Approval of September 21, 2012 Minutes

MOTION: Council member Weber moved, seconded by Council member Schimel, to approve the September 21, 2012 meeting minutes as submitted. Motion approved unanimously.

III. Discussion/Action Regarding Wisconsin Rules of Evidence

A. Wis. Stat. § 908.045 (2), Hearsay Exception for Statements of Recent Perception

Prior to the meeting, Attorney Southwick circulated a memorandum from the Evidence & Civil Procedure Committee containing its recommendation with regard to s. 908.045 (2). Council member Shriner (Chair of the Evidence & Civil Procedure Committee) explained that the hearsay exception for statements of recent perception was originally one of the proposed federal rules. Although it was never adopted at the federal level, Wisconsin and a handful of other states adopted it.

As part of the Evidence & Civil Procedure Committee's comprehensive review of the Wisconsin Rules of Evidence, Marquette University Law School Professor Dan Blinka suggested that the committee consider whether s. 908.045 (2) should be retained. The committee studied the issue and found no significant problems with the application of the rule as reported by judges or attorneys, or indicated by appellate case law. Committee members generally agreed that the rule contains protections to insure that evidence admissible under the rule is sufficiently reliable.

The Evidence & Civil Procedure Committee found no problems or complaints regarding the current rule, so it recommended no amendment at this time.

MOTION: Council member Weber moved, seconded by Council member Blanchard, to accept the Evidence & Civil Procedure Committee's recommendation. Motion approved with Council member Roggensack abstaining.

IV. Discussion/Action Regarding Supreme Court Rules Petition 12-03 Relating to Inadvertent Disclosure of Protected or Privileged Information

Attorney Southwick reported that on September 19, 2012, the Wisconsin Supreme Court held a public hearing on the Judicial Council's Rule Change Petition 12-03. The hearing was followed by an open administrative conference of the court. At the conference, the court unanimously approved the Council's rule change petition. However, the court requested that the Council make some minor amendments to the Judicial Council Notes that accompany the amendments. The Notes reference the federal rules upon which the amendments are based, and refer to the federal Advisory Committee Notes that accompany those rules. The court asked the Council to incorporate direct quotes from the relevant portions of the Advisory Committee Notes into the Council's own Notes to be published with the rules.

The court also requested that the Council consider the issue of applicability. The Evidence & Civil Procedure Committee recommended that the court use the applicability clause that accompanied Rule 502, Federal Rules of Evidence, with modifications to conform it to Wisconsin drafting standards. Under the recommendation, the new rules will apply to all proceedings commenced after the effective date, as well as all pending proceedings, to the extent that it is "just and practicable." Council member Weber supported this language and felt that it would prevent the type of the confusion that has surrounded the application of the recently amended evidentiary rule regarding expert testimony.

At its last meeting, the Evidence & Civil Procedure Committee reviewed and approved a draft of the amended Judicial Council Notes and the recommendation regarding applicability. Attorney Southwick circulated a memo containing the recommendations to Council members prior to the meeting. Attorney Southwick reported that if the Council is able to approve a recommendation at today's meeting, court staff believes it is possible to meet the publication requirements to have a January 1, 2013 effective date for the new rules. If the Council approves the recommendation, she will file an amendment to Petition 12-03.

MOTION: Council member Wagner moved, seconded by Council member Ptacek, to approve the amended Judicial Council Notes and the recommendation regarding applicability. Council member Roggensack asked whether the amended Notes contain all of the federal commentary or whether only relevant portions were specifically selected. Attorney Southwick stated that the amended Notes contain only the portions of the federal commentary applicable to the portions of the federal rules upon which the new Wisconsin rules were modeled. Council member Schultz proposed that the applicability language should be amended to delete "such" and replace it with "the." A friendly amendment to the motion was accepted. The amended motion was approved with Council member Roggensack abstaining.

V. Discussion/Action Regarding Judicial Council Accessibility and Visibility

Council member Gleisner expressed concern that many lawyers around the state are not aware of the important work carried out by the Judicial Council. He made a number of proposals aimed at increasing the visibility and accessibility of the Council and its work, as contained in his memo dated October 9, 2012. For example, he proposed that the Council appoint a publication committee and assign it the task of writing articles about the Council and its work. Council member Weber spoke in support of the creation of a publication committee.

Council member Gleisner also proposed publication of the Council's meeting agendas in a location likely to reach members of the legal community. Prior to the meeting, Attorney Southwick obtained information regarding publication of the agenda in the *Wisconsin Lawyer*. Members concluded it would be cost prohibitive. However, the State Bar offered to publish information in its electronic newsletter called Inside Track without cost to the Council. The Council would be responsible for selecting the content and writing its own headlines. The editor encouraged the use of creative headlines to motivate readers to click on the link to open the article. She discouraged simply posting an agenda. Council member Barden stated that the Board of Governors, of which she is a member, is also moving toward utilizing electronic publications such as Inside Track. She offered to assist the Council with exploration and implementation of this proposal.

As another way to increase the accessibility and visibility of the Council, Council member Gleisner offered to scan public documents maintained by the Council and make them available to the public on a private web site, which he would host at his cost. Members thanked Council member Gleisner for his generous offer to assist with a web site. However, members raised a number of concerns. Council member Wagner was opposed to creating a private site for access to public information, and noted that the Council already has a web site. Council member White stated that the Council cannot accept a "gift" from a private individual. Council member Weber shared this concern, and suggested that state law or ethics requirements would likely prohibit either a financial or an in-kind gift such as the creation and maintenance of a private web site. He proposed that the Council seek an opinion from the Attorney General prior to accepting any gifts or private donations of this nature. He also questioned whether a private "document repository" web page would be a good policy decision.

Council member Ptacek asked about the current accessibility of the Council's minutes. Attorney Southwick explained that the minutes are posted on the Council's website. They are also available at the State Law Library, and the Legislative Reference Bureau.

Council members discussed posting the meeting agendas on the Council's website. Attorney Southwick stated that CCAP created and currently maintains the Council's website. Any changes to the site must be done by CCAP. She has no control over how quickly updates are made to the site, but she will talk with CCAP about the possibility of posting agendas to the website.

Council member Gleisner also suggested that the Council encourage Wisconsin Eye to resume broadcasting its meetings. Several members spoke in opposition to this request.

Members discussed the preservation of Council records. Attorney Southwick explained that because the Council's records are a valuable source of history for court-related statutes and rules, the State Law Library maintains a Judicial Council collection that contains records dating back several decades. The Historical Society maintains even older Council records, dating back to the Council's creation in 1951. The State Law Library also has a very detailed and searchable electronic index of the Council's records. The archive aids in making the Council's historic records available to the public and accessible for the legal community.

MOTION: Council member Weber moved, seconded by Council member Barden, to accept Council member Gleisner's memorandum with gratitude, to agenda the creation of a publication committee for further discussion at next month's meeting, and to table the remaining proposals contained in the memo (creation of a private website and encouraging Wisconsin Eye to cover Council meetings). Motion approved unanimously.

Sandy Lonergan, Government Relations Coordinator for the State Bar, stated that her department also has an electronic newsletter (the Rotunda Report) that has a bit different target audience than Inside Track. It includes members of the State Bar, but also legislators. She also communicates with the leadership of all the State Bar section boards. Her department is able to relay information easily and inexpensively to a large audience. She offered to distribute the Council agenda, minutes or any other information the Council wishes to convey, but explained that as a lobbying entity, her department cannot provide anything of value to the Council. However, conveyance of information about the Council and its work to the State Bar's members is an appropriate activity for her department because they regularly convey information about the work of other public entities.

Judge White suggested that before the Council accepts any assistance with circulating information, the Council should define the source and cost of the assistance, and whether the Council is receiving the same treatment as other similarly situated groups. Attorney Southwick stated that a publication committee could explore the issue further and report to the Council. Council member Roggensack suggested that everything should be submitted to the Council for prior approval.

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

Attorney Southwick stated that CCAP and court operations contacted her with a list of questions about the criminal procedure bill. Council member Schultz stated that the drafting committee recognized that CCAP would likely have to make some adjustments to implement the bill, but the committee agreed it did not possess the technical knowledge to address those issues.

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

Attorney Southwick reported that the Appellate Procedure Committee identified two minor corrections to the presentence investigation report (PSI) bill analysis on page three of the draft. It previously stated, "The bill requires the clerk of circuit court to retain a copy of the

PSIM in an envelope marked as confidential and destroy any copies except those retained by the district attorney, the defendant's attorney, a successor attorney and DOC." DOC (Department of Corrections) should be deleted from that list because DOC retains the final report, not all of the presentence investigation materials (PSIM). Attorney Southwick clarified that the bill defines "presentence investigation materials" to mean a presentence investigation report, written objections to a presentence investigation report, any revised presentence investigation report, court findings and orders, and the final presentence investigation report.

The analysis also previously read, "Under the bill, if the defendant establishes that the PSIM contains material misstatements, DOC is required to correct the information and may use the corrected information only..." The committee requested that "may" be changed to "shall" because it is mandatory, not permissive. Attorney Southwick also stated that DOC had a designated representative who served on the committee that drafted the bill, so DOC had input into the proposed amendments.

The Legislative Reference Bureau drafting attorney is redrafting the bill for the 2013 legislative session. As soon as she is finished, they can begin the fiscal estimate process.

VIII. Discussion and/or Action Regarding Budget Process

Attorney Southwick asked if any members have follow-up questions regarding the Council's budget. Council member Roggensack questioned the decrease in the Full Funding of Continuing Position Salaries and Fringe Benefits and encouraged Attorney Southwick to talk with Pam Radloff, Director of State Courts Office, about this portion of the budget. Attorney Southwick will follow up with Ms. Radloff on the issue.

IX. Committee Reports

A. Appellate Procedure

Committee Chair Blanchard reported that the committee continues to discuss proposed rules for protecting crime victim identity in appellate documents that are publically available via the internet. At today's meeting, the committee will discuss the positions of its members with regard to the proposed rules.

Council member Roggensack discouraged the use of first name and last initial because it does not sufficiently conceal the identity in some cases. She suggested using only initials. Committee Chair Blanchard explained that the committee is discussing prohibiting the use of names or initials.

B. Criminal Procedure

Attorney Southwick reported that the committee met earlier this month. Members received a general overview of all of the projects that have been assigned to the committee including warrants for GPS tracking, plea withdrawal and the definition of "presence" in the criminal code.

The committee also continued to discuss substitution of the judge in termination of parental rights (TPR) cases. The committee received more information, including statistics from CCAP that indicate how frequently multiple substitutions have occurred in TPR cases over the past ten years. The numbers indicate that multiple judicial substitutions are rare in small counties. The committee tabled the project pending receipt of any evidence that demonstrates that multiple substitutions are causing inefficiency or delays.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee continues to discuss whether to codify the holding in *Alt v. Cline*, 224 Wis.2d 72, which created a privilege permitting experts to refuse to testify in certain circumstances. The committee met over the summer to finalize a rule draft and circulate the draft for comments from potentially interested groups. The committee received feedback from a number of groups, and will begin discussing the feedback at today's meeting.

Council member Weber previously reported that there was an appeal pending involving the Marshfield Clinic's request for expert witness fees in a criminal case in which a doctor at the clinic was called to testify even though the doctor was called as a fact witness, not an expert. The circuit court denied the request. The appellate court has dismissed for lack of jurisdiction.

X. Other Business

A. PPAC Liaison's Report

There was no report.

B. Council Attorney's Report

Attorney Southwick followed up on last month's discussion regarding a request to update the term "videotape" in Chapter 885. The Council previously agreed that this project was more appropriate for the Legislature because it could potentially affect many different chapters in the statutes. Attorney Southwick obtained information from the Legislative Council about the Law Revision Committee that handles minor substantive remedial proposals. She contacted the attorney who staffs the committee. The staff attorney felt it was an appropriate request to bring to the committee but stated that the Council would be responsible for submitting a request and providing the support for the change. The Council did not support any further action.

XI. Adjournment

The Council adjourned by consensus at 11:05 a.m.