

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 17, 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 R. Fitzpatrick, William C. Gleisner, Jill M. Kastner, Tracy K. Kuczenski, Devon M. Lee, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Greg M. Weber, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Senator Glenn Grothman, Benjamin J. Pliskie, Brad Schimel, Honorable Jeffrey A. Wagner, Honorable Maxine A. White, Amy E. Wochos.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Nancy Rottier, Director of State Court's office.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. and members introduced themselves.

II. Approval of September 19, 2014 Minutes

MOTION: Council member Ptacek moved, seconded by Vice Chair Blanchard, to approve the September 19, 2014 minutes. Motion approved unanimously.

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

Attorney Southwick reported that earlier in the week, the Legislative Reference Bureau (LRB) completed the draft bill containing the amendments approved by the Council at the previous meeting. The draft also contains a number of notes with questions and comments from the LRB drafting attorney. Attorney Southwick is in the process of reviewing the notes and updating the redlined version of the bill. She has also forwarded the revised bill to all the stakeholders who participated on the Criminal Procedure Committee to review the bill over the summer. She asked current and former committee members to provide her with their comments or concerns prior to the next committee meeting on November 11, 2014. Attorney Southwick hopes that the committee can have most of the questions resolved prior to the Council's next meeting on December 12, 2014, so that the Council can finalize the updated bill. If any of the amendments by the LRB resulted in substantive changes not intended by the Council, Attorney Southwick will bring those changes to the Council's attention for consideration at the next meeting. The bill remains on track to be ready for introduction in January 2015.

At the previous meeting, Council member Weber reported that the Department of Justice (DOJ) opposes an amendment to the strip search provisions in the bill. He explained that under

current law, Wis. Stat. § 968.255 contains criminal penalties for conducting unlawful strip searches, but it does not provide for suppression as a remedy for a violation of the statute. As modified in the bill, 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."

Council member Weber 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. Prior to the meeting, Attorney Southwick distributed a copy of *State v. Minett* to all Council members. Council member Shriner noted that *Minett* did not call for suppression under current law, but the Legislature can change the law to statutorily include suppression as a remedy for violating the strip search provisions.

Council member Schultz noted that suppression as a remedy was not in the original Council draft. The change appears in a later draft (2004) because the Criminal Procedure Committee felt that suppression would be a more effective incentive to encourage compliance than the current criminal penalty. Council member Schultz could not recall why the current bill contains both suppression and a criminal penalty as a remedy for violation of the strip search provisions.

Council member Shriner observed that the strip search statute contains many technical requirements that could result in inadvertent noncompliance with the statute. He expressed concern that suppression could be the remedy for unintentional noncompliance. However, in his opinion, the appropriate remedy for a violation of the strip search statute is a policy decision that should be determined by the Legislature.

Council member Gleisner inquired whether the issue of suppression as a remedy for noncompliance with the strip search statute was raised during the Criminal Procedure Committee's work on the bill over the summer. Vice Chair Blanchard responded in the negative. DOJ did not propose that it be included in the committee's workplan.

Council member Ott encouraged the Council to resolve as many issues as possible prior to the bill's introduction. Attorney Southwick noted that the Criminal Procedure Committee is meeting prior to the next Council meeting, so the Council could ask the committee to make a recommendation. Vice Chair Blanchard reminded members that the Criminal Procedure Committee has returned to its regular size (7 members), as opposed to the greatly expanded number (16 members) that it enjoyed over the summer while the committee reviewed the criminal procedure bill. Council member Lee noted that one reason the committee greatly expanded its membership to review the bill was because some stakeholders expressed a desire to provide more input in the drafting process. She was opposed to asking the committee to consider a provision in the bill without the participation of the ad hoc members who worked on it over the summer. Vice Chair Blanchard, who also chairs the Criminal Procedure Committee, expressed doubt that the committee will be able to reach consensus on the issue of suppression.

Council member Lee spoke in support of suppression as an appropriate remedy because a violation of the strip search statute is a physical violation of a person's body. Council member

Shriner suggested that suppression may be appropriate in certain cases, but he expressed concern with mandatory suppression for any violation of the statute. Attorney Southwick asked Council member Weber whether DOJ might withdraw its objection if suppression is not mandatory. He responded in the negative, and indicated that DOJ will remain opposed unless suppression is completely removed as a remedy for violating the strip search statute. Given DOJ's position, Attorney Southwick agreed with Vice Chair Blanchard's concern that the committee might not reach consensus on the issue.

MOTION: Council member Weber moved, seconded by Council member Myers, to ask the Criminal Procedure Committee to examine the issue of a remedy for a violation of the strip search statute and make a recommendation to the Council. Motion failed with three members in support, nine members opposed, and Council members Ott and Ziegler abstaining. No further action was taken.

IV. Discussion and/or Action Regarding Committee Recommendation Regarding Privileged Communications, Wis. Stat. § 885.205

This project came to the Judicial Council when an attorney from the Legislative Reference Bureau requested that the Council study Wis. Stat. § 885.205, which appears to create a privilege for communications between a student and a dean of students or a school psychologist. Wis. Stat. § 905.04, known in Wisconsin as the “physician-patient privilege,” also includes privileged communications between a patient and a psychologist. However, the language of the privilege in s. 885.205 is very different from the other privileged communications in chapter 905.

Prior to the meeting, Attorney Southwick circulated a memorandum containing a recommendation from the Evidence & Civil Procedure Committee to repeal Wis. Stat. § 885.205. Committee chair Shriner stated that the memorandum details how the committee reached its recommendation. Prior to the adoption of Wisconsin’s Rules of Evidence, privilege rules were found generally in ch. 885 of the statutes. Many of those rules were incorporated into ch. 905 when the Rules of Evidence were adopted. For reasons that remain unknown, s. 885.205 remained in ch. 885, and although s. 885.205 is titled “privileged communications,” the text of the statute does not contain the word “privilege.”

In arriving at its recommendation to repeal s. 885.205, the committee considered that the provision contains inconsistent terminology, it is very vague, and it would be difficult to apply in practice. There is no case law interpreting or applying it, and s. 885.205 is mentioned only in passing in one unpublished appellate opinion.¹ The committee was unable to locate any history explaining the statute’s origin or reason for creation.

Prior to recommending repeal, the committee contacted legal counsel for the Wisconsin Association of School Boards, the Wisconsin Association of School Psychologists, and the Wisconsin Council of Administrators of Special Services. There was no opposition to repeal from any of those groups. The Executive Director of the Wisconsin Council of Administrators

¹ *State v. Seiler*, 205 Wis. 2d 112, 555 N.W.2d 410 (Ct. App. 1996).

of Special Services and the President of the Association of School Psychologists both support repeal of s. 885.205 because they believe that instead of being beneficial, the statute is really a trap for the unwary. They also felt the rule is unnecessary because school psychologists already have ethical obligations regarding confidentiality.

MOTION: Vice Chair Blanchard moved, seconded by Council member Weber, to accept the Evidence & Civil Procedure Committee's recommendation to repeal Wis. Stat. § 885.205. Motion approved, with Council members Ott and Ziegler abstaining.

Council member Ott explained that the Legislature's Law Revision Committee handles the repeal of irrelevant or out-dated statutes. He suggested that the Council refer repeal of s. 885.205 and the Deadman's Statute² to the Law Revision Committee.

Council member Ptacek stated that it is becoming increasingly more common for private practice psychologists to visit schools to provide services to students. In those cases, the physician-patient privilege is more likely to be applicable, rendering s. 885.205 even more out-dated.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to study Rule 809.15, the record on appeal. At its last meeting, the committee agreed to incorporate the recommended amendments to ch. 809 that are currently found in the draft presentence investigation report bill into the recommended changes to Rule 809.15. The committee continues to study how to address audio recordings in the record. The committee discussed transcript requirements, and is focusing on the issue of inaudible portions of the recording and cases in which the parties do not agree on the content of the recording.

The committee also continues to work on the issue of prisoner challenges to agency decisions. The committee is working on a draft bill to reorganize the relevant statutes into one subchapter to make it easier to locate the applicable law, which is now scattered throughout several chapters of the statutes.

B. Criminal Procedure

Committee chair Blanchard reported that the committee has preliminarily agreed that there appears to be no reason to recommend adoption of the Uniform Electronic Recordation of Custodial Interrogations Act. Attorney Southwick added that the committee has been unable to identify any deficiencies or problems with current Wisconsin law in this area. The committee will hear input from several committee members who were absent at the previous meeting prior to making its final recommendation.

² As part of its comprehensive review of the Rules of Evidence, the Judicial Council previously voted to recommend repeal of the Deadman's Statute, Wis. Stat. § 885.16.

The committee will also resume its study of procedural concerns related to police searches using GPS and other tracking technology. The committee will also look at some concerns that were previously raised by committee members regarding the procedures in newly adopted Wis. Stat. § 968.373, warrant to track a communications device.

In conjunction with approving several amendments to the criminal procedure bill, the Council also authorized the Criminal Procedure Committee to study and make recommendations in the following areas: preliminary hearings, discovery depositions, and search warrants and interception of electronic communications. Attorney Southwick recommended expanding the committee membership prior to beginning those projects. She noted that it could take some time to locate new ad hoc members with specialized knowledge and a willingness to participate in those studies.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues its work on Wisconsin's class action statute, and he provided some historical background on the law. He stated that the committee is currently studying provisions in the federal class action statute (Rule 23 (a) and (b)) for possible adoption in Wisconsin. Council member Fitzpatrick shared some issues he encountered while writing an opinion in a recent class action case, including the dearth of Wisconsin case law.

VII. Other Business

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

Council member Ott reported that the Legislative Council Committee studying the transfer of structured settlement payments continues to meet, and has begun reviewing a draft bill. He anticipates that the committee will approve a bill in the near future and may ask the Council to review it prior to introduction in the upcoming legislative session.

B. PPAC Liaison's Report

There was no PPAC report.

C. Council Attorney's Report

1. Supreme Court Rule Change Petition 13-16, Uniform Interstate Deposition and Discovery Act

Attorney Southwick extended her thanks to Council member Shriner for his assistance presenting the rule petition to the supreme court at the September 29, 2014 public hearing. There has been no opposition to the proposed rule and the State Bar Board of Governors voted to unanimously support the proposed change. The court has not discussed the merits of the petition in administrative conference yet.

2. Supreme Court Rule Change Petition 14-01, Identification of Crime Victims in Appellate Briefs and Opinions

Attorney Southwick reported that she and Vice Chair Blanchard presented the rule petition to the supreme court at a public hearing on September 22, 2014. Several groups, including the Department of Justice, the State Bar Appellate Practice Section, and victims' advocates, also supported the proposed rule. At the administrative conference, the justices agreed to amend their internal style manual to avoid the use of crime victims' names in opinions, but they have yet to act on the petition.

VIII. Adjournment

The Council adjourned at 10:50 a.m.