

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 21, 2016

The Judicial Council met at 9:30 a.m. in Room 328NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Sarah Walkenhorst Barber, Honorable Michael R. Fitzpatrick, Christian A. Gossett, R. Duane Harlow, Devon M. Lee, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Sherry D. Coley, William C. Gleisner, Professor Steven Wright.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Marisa Janssen, Winnebago County District Attorney's office.

I. Call to Order, and Roll Call

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

II. Approval of September 16, 2016 Minutes

MOTION: Council member Myers moved, seconded by Council member Wagner, to approve the September 16, 2016 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Recommendation to Amend Wis. Stat. § (Rule) 809.107, Appeals in Proceedings Related to Termination of Parental Rights; Wis. Stat. § (Rule) 809.14, Motions; Wis. Stat. § (Rule) 809.15, Record on Appeal, and Wis. Stat. (Rule) 809.19, Briefs and Appendix; Wis. Stat. § (Rule) 809.30, Appeals in s. 971.17 Proceedings and in Criminal, ch. 48, 51, 55, 938, and 980 Cases; Wis. Stat. § (Rule) 809.32, No Merit Reports; and Wis. Stat. § 885.42, When Available (videotape procedure)

At the previous meeting, the Council discussed the amendments recommended by the Appellate Procedure Committee and proposed two suggested modifications. Council member Ptacek reported that the committee discussed the two proposed changes at its previous meeting and approved them.

Prior to the meeting, Attorney Southwick circulated an amended copy of the proposed amendments. The Council reviewed and discussed the two changes. Council member Ptacek noted that while the committee approved the changes, members have not seen the amendments in writing yet. They will be reviewing them at today's meeting.

MOTION: Council member Ptacek moved, seconded by Council member Myers, to approve the recommendation as amended, subject to final approval by the Appellate Procedure Committee. Motion approved with Council members Ott, Wanggaard, and Ziegler abstaining.

Attorney Southwick explained that the Appellate Procedure Committee circulated a draft of the recommended amendments to a few potentially interested parties, including the State Bar's Appellate Practice Section, the Wisconsin Department of Justice and the State Public Defender's office. Based on the feedback received from those groups, the committee revised its recommendation prior to forwarding it on to the full Council for consideration. Attorney Southwick asked whether the Council would like to circulate the proposal again for feedback now that it has undergone several amendments. She suggested that it could be circulated to a wider audience. Chair Bertz spoke in favor of vetting the proposal again and sending it to a wider group of stakeholders. Attorney Southwick stated that she has several lists of potentially interested groups that she has used to circulate past recommendations for the Council. She will also consult the Appellate Procedure Committee for additional suggestions.

MOTION: Council member Myers moved, seconded by Council member Wagner, to circulate the proposed amendments for additional feedback from potentially interested parties with a comment deadline prior to the Judicial Council's December 16th meeting. Motion approved with Council members Ott, Wanggaard, and Ziegler abstaining.

IV. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence, Supreme Court Petition 16-01 and 16-02

Attorney Southwick reported that she and Tom Shriner are going to present the petitions to the court at the public hearing on October 24, 2016. The court received no written comments in opposition to the Council's recommended changes. Two private practice attorneys submitted written comments in support of eliminating the Deadman's statutes. They also indicated that they plan to attend the hearing to speak in support of the petition. The Wisconsin District Attorneys Association also submitted a letter in support. Copies of the letters were included in the Council's meeting material. Council member Shriner reiterated several reasons to support repeal of the Deadman's statutes. Council member Stertz reported that the State Bar Board of Governors did not take a position on the petitions.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to discuss withdrawal and substitution of counsel at the appellate level. The committee will continue to review a draft rule proposed by Chief Staff Attorney Jenny Andrews, Court of Appeals.

Attorney Southwick reported that the draft bill regarding procedural challenges to agency decisions is ready for introduction. The Department of Justice has withdrawn its request for further consideration of the venue provision. At today's meeting, the committee will be considering the inconsistent use of the terms "preliminary" and "temporary" injunction in one

section of the draft. She noted that the inconsistency is in current law, but the Council suggested that the bill should correct it.

B. Criminal Procedure

Committee chair Blanchard reported that the committee continues to discuss the scope of the problems that were reported regarding the current discovery rules for criminal cases. The committee is currently focused on identifying which counties have discovery practices that have been identified as problematic and which counties are using what is considered “best practices.” Once the committee completes its fact-finding and determines the scope of the problem, it will consider whether improvements should be implemented through training and education, or whether statutory changes are needed.

Council member Gossett added that the committee’s study has revealed that not only are there reported problems in some counties regarding the flow of information from the prosecutors to the defense attorneys, but there also appears to be some problems with prosecutors failing to receive all the potentially discoverable information from law enforcement. Committee chair Blanchard agreed, noting that the committee has received reports that some prosecutors are instructing defense counsel to seek discoverable information directly from the investigating law enforcement agencies.

Council member Wanggaard inquired whether there is a specific type of information that law enforcement is not providing. Committee chair Blanchard responded that the committee is still studying the issue, but it appears that digital evidence may be a problem, including third party videos. Council member Ptacek stated that in his experience, problems with disclosure can occur when the investigation is on-going after the defendant’s initial appearance, but law enforcement fails to continue to produce information.

Council member Gossett explained that body cameras present an additional challenge. For example, if six officers are on the scene with cameras recording, all six videos may be discoverable. Prosecutors do not have time to view all the recordings in some cases. He predicted that storage of all the various recordings is also going to present a challenge for prosecutors and law enforcement. The Council discussed the potential for preservation issues to arise, noting that the standards are very different between criminal cases and civil cases.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to work on a draft class action statute modeled on the federal class action rule (Rule 23). He noted that the feedback received by the committee indicates that the proposed rule will have the support of both the plaintiffs’ bar and the defense bar. The committee continues to discuss the content of the Judicial Council Notes to include in the proposed rule, and is considering whether any text from the Rule 23 comments from the federal Advisory Committee should be included.

The committee will also begin discussing s. 885.03, service of subpoena. It will consider a relevant and recent unpublished court of appeals case for which the supreme court has granted

review. A supreme court decision could provide valuable guidance regarding whether service should be different in criminal cases.

Finally, the committee will resume its discussion regarding the duty to preserve evidence and spoliation. Federal Rule 37, on which Wisconsin's rule is modeled, has recently been amended with regard to electronically stored information. The committee will study the amendment and consider whether Wisconsin's rule should be amended to reflect the federal changes.

The Judicial Council previously issued recommendations to update Wisconsin's discovery rules to reflect the discovery of electronically stored information. Attorney Southwick explained that the committee has continued to monitor developments in the federal rules upon which Wisconsin's rules are based, and has observed a trend of extremely harsh sanctions issued by courts pursuant to federal Rule 37 for failure to properly preserve electronically stored information. The federal rule was amended last year to address that issue, so the committee will consider amendments to Wisconsin's rule to maintain consistency.

VI. Other Business

A. PPAC Liaison's Report

Council member Moran reported that PPAC considered and accepted a report from the limited scope subcommittee. The proposal would allow practitioners who act as mediators to prepare paperwork in some limited circumstances. The proposed amendment has been filed as supreme court petition 16-04.

PPAC also considered four budget requests on behalf of the court, including an additional staff attorney position at the court of appeals, the creation of a 4-person data analysis team in court operations, consolidation of the Judicial Council within the director of state court's office, and a minor technical change to the court's internal accounting procedure. PPAC approved and recommended all four requests. The supreme court ultimately denied all of the requests except the minor technical change regarding internal accounting.

B. Council Attorney's Report

Attorney Southwick had no additional report.

Council member Ptacek reported that an OLR (Office of Lawyer Regulation) procedure review committee has been appointed, and he has been named chair of the twenty-member committee. He welcomed council members to contact him with their thoughts or concerns regarding the OLR process and areas that should be reviewed. Attorney Southwick invited him to notify the Judicial Council if he believes the Council can be of assistance to the committee.

VII. Adjournment

The Council adjourned by consensus at approximately 10:35 a.m.