

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 16, 2012

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Tracy K. Kuczenski, Catherine A. La Fleur, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Vice Chair Honorable Brian W. Blanchard, Christine Rew Barden, Allan M. Foeckler, William Gleisner, Senator Fred Risser, Honorable Patience Roggensack, Honorable Jeffrey A. Wagner, Greg M. Weber.

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 9:40 a.m.

II. Approval of October 19, 2012 Minutes

Council member La Fleur noted a typographical error on page 3, third paragraph, line 3: “obtain” should be “obtained.”

MOTION: Council member Ptacek moved, seconded by Council member La Fleur, to approve the October 19, 2012 meeting minutes as amended. Motion approved unanimously.

III. Discussion/Action Regarding Judicial Council Accessibility and Visibility

At the previous meeting, 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 to the Council, dated October 9, 2012.

As suggested at the previous meeting, Attorney Southwick contacted the Council's web administrator about posting Council meeting agendas on the Council's web site. The web administrator created a link to the agendas, and they can be accessed on the page containing the meeting dates.

Attorney Southwick announced that an emergency prevented Council member Gleisner from attending today's meeting. He requested that the Council table further discussion regarding

the appointment of a publication committee until the Council's January 18, 2013 meeting. Council member Ptacek was not opposed to postponing discussion of a publication committee, but stated that members should refrain from authoring any articles regarding the Council or its work until after the Council has formally discussed the issue of a publication committee. Attorney Southwick reported that Judge Sankovitz and Judge Leineweber have volunteered to work with her on an article regarding the new rule amendments on inadvertent disclosure of privileged information. Members agreed that since the judges are working with Attorney Southwick on an article discussing Council work that has been completed and approved by the court, they could proceed with the article. Members will discuss this item further at the January meeting.

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

Professor Schultz reported that the Legislative Reference Bureau (LRB) has prepared another draft of the criminal procedure bill, and has sent back another list of questions. The latest draft does not contain all the changes that the Council requested and there is no bill analysis. The criminal procedure workgroup will meet on November 29th to begin responding to the new questions from the LRB.

Attorney Southwick stated that due to the drafting delays, the bill will not be ready for introduction in January. The Council discussed how the delay could affect the bill's ultimate success. Council member Ott stated that the Legislature is expected to focus primarily on the budget until June, so the criminal procedure bill would probably not receive much attention until summer. He also suggested that even if the bill's introduction continues to be delayed, any groundwork that is laid in this session could improve the chances of the bill's passage in the next session.

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

Attorney Southwick reported that the Department of Administration has circulated the presentence investigation report bill for fiscal estimates. The State Public Defender's office has submitted an estimate. The LRB indicated that the district attorneys' estimate is expected in the near future. A fiscal estimate was also requested from the state courts, the Department of Corrections, and the Department of Health Services. Council member Wagner asked whether an estimate was requested from the Department of Justice. Council member Weber will inquire as to whether his department received a request.

VI. Discussion and/or Action Regarding Institute for the Advancement of the American Legal System's (IAALS) Rules of Civil Procedure Pilot Projects

The Council has been monitoring the work of the Institute for the Advancement of the American Legal System (IAALS) for several years. In advance of the meeting, Attorney Southwick circulated a memo updating the Council on the status of some of the latest pilot projects currently being conducted in other states. Many of the recommendations from IAALS are a result of collaboration with the American College of Trial Lawyers (ACTL). Many of the

pilot projects focus on streamlining litigation, and in particular, improving the discovery process to make it faster and less expensive. She asked members whether they would like her to obtain more information on any projects in other jurisdictions, or whether members are interested in discussing the idea of a pilot project in Wisconsin.

Council member Shriner explained that the ACTL began to discuss reform in response to the significant decline in civil jury trials attributed to the increasing expense of the process. A number of states that have implemented pilot projects have focused on business litigation. He suggested that the Council should monitor the results of other projects to see whether the changes might be effective in Wisconsin.

Council member Ptacek stated that Wisconsin has participated in a nationwide study tracking the number of trials and the amount of recovery. The study indicates that both numbers have been in a decline for over a decade. He added that his personal experience as a judge also indicates that the number of jury trials has declined significantly during his twenty-five years on the bench. He suggested that it is a problem worth studying, but he is not sure whether the Judicial Council is the appropriate body to work on it. He suggested contacting David Hass, Judicial Education, to see whether trial judges could discuss the issue at an upcoming conference.

Council member La Fleur was interested in reviewing data on this issue. She suggested that in her experience, the delays in family court are a more pressing problem than other types of litigation. Ben Pliskie supported the idea of collecting data and suggested that the Council should request data from CCAP. Attorney Southwick stated that the Council as a whole could continue to study the issue or refer it to a committee for further study.

MOTION: Council member White moved, seconded by Council member Shriner, to refer this matter to the Evidence & Civil Procedure Committee for further study. Motion approved unanimously.

VII. Discussion and/or Action Regarding the Precedential Value of Partially Overruled Appellate Decisions

The Appellate Procedure Committee was asked to study the issue of precedential value of partially overruled appellate decisions following the supreme court's decision in *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78. The committee received a research memorandum from the Council's law student volunteer. Her research focused on how other jurisdictions treat the precedential value of partially overruled appellate decisions. The committee also reviewed a number of Wisconsin Court of Appeals decisions that have addressed the *Blum* holding, as well as the guidance provided by the supreme court's recent opinion in *State v. Stevens*, 2012 WI 97. The committee concluded that no further study is needed at this time. Prior to the meeting, Attorney Southwick distributed a memorandum from the Appellate Procedure Committee recommending no further action.

MOTION: Council member Stephens moved, seconded by Council member La Fleur, to accept the recommendation from the Appellate Procedure Committee. Motion approved with

Council member Ott abstaining. The committee extended special thanks to Colleen Marion for her research on this issue.

VIII. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the committee continues to discuss proposed rules for protecting crime victim identity in appellate documents that are publically available via the internet. The committee will meet on November 30th to continue discussing and drafting proposed rules.

B. Criminal Procedure

Committee Chair Stephens reported that the committee met last month. Members received a general overview of all of the projects assigned to the committee, including warrants for GPS tracking, plea withdrawal and the definition of “presence” in the criminal procedure 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. The committee also tabled the GPS project pending release of the Wisconsin Supreme Court's opinion in another case involving GPS tracking.

The committee will meet on November 29th. The discussion will focus on the issue of plea withdrawal and the definition of “presence” in the criminal procedural code.

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 circulated a draft rule meant to codify current case law, and received comments on it from a number of potentially interested groups and individuals. Nearly all respondents were opposed to codification and expressed a preference for current case law. Then they complained about how current case law is subject to abuse, and even provided examples, which caused some committee members to question why they prefer case law over codification.

At today's meeting, the committee intends to finalize its recommendation regarding Wis. Stat. § 906.09, Impeachment by Prior Conviction. The committee may also begin discussing Wisconsin's class action rule. Wisconsin did not adopt Rule 23, the federal class action rule. Instead, Wisconsin's rule dates from the 1800's. It has been suggested that an amendment is due.

IX. Other Business

A. PPAC Liaison's Report

Council member Voelker reported that PPAC has been focusing on the court's budget submission. At its next meeting, PPAC will review a subcommittee's rule recommendations regarding limited scope representation.

B. Council Attorney's Report

1. Budget

Attorney Southwick followed up on last month's discussion regarding the Council's budget submission. She met with Pam Radloff, Deputy Director of State Courts, regarding the budget adjustment to salary and benefits. Ms. Radloff confirmed that the adjustment in the next budget is due to the 27th pay period that occurred in the current budget cycle. All agencies are subject to this adjustment, and the Council's budget analyst prepared it correctly.

Council member Voelker further explained that this adjustment happens every six or seven years due to an extra pay period that occurs in the fiscal year requiring additional funding for salary and benefits in that budget cycle. The funding is then reduced back to the regular level in the next biennium budget. The Council's current budget reflects a return to the regular funding level for 26 pay periods.

2. Judicial Conference

Attorney Southwick reported that she attended this year's annual Judicial Conference. At the business meeting, she submitted a written report regarding the Council's accomplishments and current projects. The Judicial Conference elected Milwaukee Circuit Court Judge Jeff Wagner to replace the vacancy created by Judge Mangerson's appointment to the court of appeals.

Council member Ptacek reported that the Judicial Conference nominating committee recognized that all its current appointments to the Council are from a similar geographic area. The committee plans to recruit a judge from outstate to fill the next vacancy on the Council.

X. Adjournment

Council member Shriner asked if there were any current vacancies on the Council. Attorney Southwick reported that all vacancies have been filled, but Council member Foeckler (Governor's appointment) continues to serve, although his term expired. She has contacted the Governor's appointment secretary to request reappointment or the appointment of a new member.

The Council adjourned by consensus at 10:50 a.m.