

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 20, 2015

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, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, Tracy K. Kuczenski, 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, Greg M. Weber, Amy E. Wochos, Professor Steven Wright.

MEMBERS EXCUSED: Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis, Wisconsin State Bar; Scott Kelly, Office of Sen. Wanggaard; Meredith Ross and Matt Robles, Appellate Procedure Committee; Mike Austin, Department of Justice.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:30 a.m. and members introduced themselves.

II. Approval of October 16, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Stertz, to approve the October 16, 2015 meeting minutes. Motion approved unanimously.

III. Discussion and/or Action Regarding Draft Bill Amending Procedural Statutes Governing Prisoner Challenges to Administrative Decisions

Prior to the meeting, Attorney Southwick circulated a draft bill, a mock up showing how the new subchapter would look if the bill is adopted, and a memo summarizing the changes contained in the draft bill. Attorney Southwick explained that the amendments contained in the draft bill were written by the Council's Appellate Procedure Committee. Currently, the statutes that govern the prisoner litigation process are scattered throughout various chapters of the code, making it difficult to find and follow the proper procedures. While this is a problem for the prisoners who bring these challenges, many of whom are self-represented, it is also a problem for the judges presiding over these cases when they must determine whether the correct procedures have been followed and the Department of Justice when they are responding to these cases.

In response to this issue, the Appellate Procedure Committee asked the Legislative Reference Bureau to prepare a bill to move all the relevant statutes into one new subchapter. The committee then worked to reorder the procedures in a manner that corresponds to the order by which the case moves through the court system. Finally, the committee reviewed the applicable

case law and codified important procedural rulings. The committee's goal was to make it easier to locate and understand the proper procedure so that prisoner litigation is decided on the merits of the case, not as a result of procedural mistakes.

Attorney Southwick introduced Professor Meredith Ross and Attorney Matt Robles from the Appellate Procedure Committee. Prof. Ross recently retired as the director of the Remington Center at the University of Wisconsin Law School. Attorney Robles was a staff attorney for the Dane County Circuit Court. Both Prof. Ross and Attorney Robles had considerable experience with prisoner litigation, and provided the committee with valuable information and drafting assistance throughout the project.

Prof. Ross distributed a table of contents for the new subchapter created by the bill. The table of contents demonstrates the logic of the new organization. She explained that the committee retained the content of the current statutes. The committee's focus was on reorganizing current law to make it easier to follow. The only substantive changes involved codification of a body of case law that developed over the years to address procedural issues that arose, but were previously not governed by statute (for example, tolling and the prisoner mailbox rule). Prof. Ross also explained that the committee worked with Jenny Andrews, chief staff attorney for the court of appeals, to incorporate cross-references to relevant provisions in the rules of appellate procedure.

Council member Shriner noted that proposed s. 893.789 uses both the terms "temporary injunction" and "preliminary injunction." While this is current law, he suggested that it should be amended to use one consistent term throughout the statute. Attorney Southwick will ask the Legislative Reference Bureau to amend that provision for consistency.

Council member Shriner also noted that in proposed s. 893.781, the statute provides that payment of the prisoner's debts stemming from his or her crime must be paid first from any money judgment awarded. He observed that there is no corresponding provision addressing payment of a prisoner's debts from funds received from a settlement. He questioned the appropriateness of the prisoner's lawyer holding the settlement funds in the lawyer's trust account because it could inadvertently prevent creditors from recovering money they are owed. However, he cautioned that a rule like s. 893.781 might not facilitate settlement because prisoners may not agree to settle if the funds will be used to pay their creditors. On the other hand, the state is often the party paying the settlement and when the funds are paid outside of a judgment, they can be shielded from creditors. Council member Shriner suggested that this is a policy decision that should be addressed by the Legislature. Council member Ptacek suggested that the issue could be referred to the Appellate Procedure Committee for further study.

MOTION: Council member Ptacek moved, seconded by Council member Wagner, to approve the draft bill prepared by the Appellate Procedure Committee. Motion approved with Council members Ott and Wanggaard abstaining. Attorney Southwick will work with the Council's legislative members to introduce the bill.

IV. Discussion and/or Action Regarding Bill Amending the Rules of Criminal Procedure (Pending Assembly Bill 90 and Senate Bill 82)

Prior to the meeting, Attorney Southwick circulated a document titled “Issues/Potential Changes Summary” prepared by the Department of Justice (DOJ) and the Wisconsin District Attorneys Association (WDAA).

Vice Chair Blanchard explained that at its November 10, 2015 meeting, the Criminal Procedure Committee began discussing each item contained in the summary. Draft minutes from that meeting were circulated to Council members. He asked whether Council members would like to discuss each item in the summary from DOJ and WDAA.

Council member Wochos asked what the Council’s action could be in response to the issues that were raised. Attorney Southwick explained that at this point, it is no longer up to the Council to amend the bill. Any action to amend the bill would need to come from the Senate and Assembly Judiciary Committees. However, Council feedback could be helpful to the legislative members, particularly with regard to identifying those proposed changes to which there is minimal or no objection.

Council member Shriner expressed his opinion that the Council has concluded its work on the bill, and he opposed the Council taking any formal position on the proposed changes. Council member Ott reiterated the importance of having the bill supported by both the State Public Defender (SPD) and DOJ. He encouraged the Council to assist in facilitating agreement among the stakeholders. Council member Wanggaard reported that DOJ and SPD have reached agreement on many of the issues contained in the summary. He also explained that some issues can be removed from the list because the Legislature will handle them in separate legislation. For example, he supported removing the amendments to chapter 975 from AB 90/SB 82. Because competency and mental health is such a complex area of law, the Legislature would prefer to address it in a separate bill. He and Council member Ott will be meeting with representatives from DOJ and SPD to try to reach agreement on the remaining points. They will invite Attorney Southwick to attend the meeting. Council member Wanggaard would like the issues resolved within the next month so that the bill is ready to move forward in January.

Attorney Southwick encouraged the Council to continue to discuss items raised in the summary from DOJ and WDAA. While she noted that support from DOJ and SPD is very important, she also noted the importance of input from judges and court staff, as well as the private bar, particularly in response to some of the proposed changes in the summary.

Council member Lee noted that the Criminal Procedure Committee previously spent many hours considering the concerns and proposed amendments raised by various groups, including DOJ and WDAA, prior to reintroduction of the bill. Now DOJ and WDAA have presented another list of concerns and proposed amendments. She asked whether DOJ and WDAA will finally take a position in support of the bill if their proposed amendments are made. If not, she suggested that further discussion would not be a productive. Council member Weber stated that if the bill is amended, it will be subjected to another review by DOJ.

Council member Fitzpatrick asked whether a representative or a group of representatives of the Judicial Council should be delegated to speak on behalf of the Council in response to

proposed amendments, rather than having a discussion involving the entire Council. Vice Chair Blanchard added that a comprehensive review of the each issue that has been raised is a very time consuming exercise. Council member Wanggaard expressed optimism that most of the issues will be resolved at the meeting to be scheduled with him and Council member Ott. He suggested that it might be helpful to bring the remaining items back to the Council for a discussion to flush out the issues. Council member Weber expressed his opposition to further discussion by the Council. He suggested that further discussion should be between individual members and legislators. Council member Gossett agreed, and expressed his concern with being able to adequately represent the interests of 70 different district attorneys if the Council undertakes further discussions. Council member Van De Hay also agreed, but supported Attorney Southwick's attendance at the meeting with the legislators so that the Judicial Council, as the drafting body, continues to be represented in discussions. Attorney Southwick expressed her concern with conducting discussions without input from judges because some of the proposed amendments directly affect the court.

Attorney Southwick recommended tabling further discussion until the next meeting. The delay will allow the Council's legislative members to facilitate a meeting with DOJ and SPD. She expressed hope that those groups can reach some compromises that will result in a shorter list of contested amendments. She suggested that it might be a better use of the Council's time to focus its discussion on those proposed amendments to which there is strong disagreement between stakeholders. She also suggested that it will be important for the Council to discuss procedural changes that will directly impact judges and the court. Council member Moran agreed, and stated that the courts will want to review proposed amendments and offer input. Council members agreed by consensus to table substantive discussion of the proposed amendments until the December meeting.

Attorney Southwick asked whether the Council would like the Criminal Procedure Committee to finish its review and discussion of the issues contained in the summary from DOJ and WDAA. The committee next meets on December 8, 2015, so she could relay those discussions to the Council at its December 18, 2015 meeting in the form of draft minutes. Council member Ott stated that he will have his staff work on scheduling a meeting with DOJ and SPD during the week of November 30th. The Council was not opposed to the Criminal Procedure Committee continuing its discussion of the proposed amendments.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee's work on possible amendments to Rule 809.15, the record on appeal, has been tabled. A draft amendment was nearly complete, but the clerk of the court of appeals and supreme court filed a rule change petition seeking amendment to Rule 809.15 to address issues related to electronic records. The committee has elected to wait to see what action the court takes with regard to the clerk's petition before proceeding with its recommended amendments to the same rule.

The committee discussed a potential inconsistency in Rule 809.62, but it appears that no amendment will be recommended. The committee has also been discussing size and number of briefs in multiparty cases, and reviewing rules from other jurisdictions.

B. Criminal Procedure

There was no further report.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee did not meet in October. It will meet following the Council meeting to discuss its recommendation to the Council regarding how to proceed with adoption of the proposed amendments to the rules of evidence. The committee will also discuss additional proposed changes to the recommendation regarding Rule 906.09, impeachment by prior conviction.

The committee also continues to study possible amendments to Wisconsin's class action statute (Wis. Stat. § 803.08) to bring it more in line with the federal class action statute (Rule 23).

VI. Other Business

A. Council Attorney's Report

1. 2015 Wisconsin Act 94, Structured Settlement Transfers

Attorney Southwick reported that the bill creating a statute governing transfer of structured settlement payments has been adopted. This issue arose as a Judicial Council project. As the Council began to study the issue, many policy considerations were identified. The Council determined that the project was better suited for the Legislature. At the recommendation of Council member Ott, she urged the Legislative Council to appoint a study committee to take up the issue. Council members Ptacek and Fitzpatrick served on the study committee, chaired by Council member Ott. She congratulated them on the adoption of the bill drafted by the study committee, and thanked them for their work. Council member Ott spoke very favorably regarding the whole process, and stated that the bill passed with overwhelming bipartisan support.

VII. Adjournment

The Council adjourned by consensus at approximately 10:45 a.m.