

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 18, 2013

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, Senator Glenn Grothman, Tracy K. Kuczenski, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Greg M. Weber.

MEMBERS EXCUSED: Allan M. Foeckler, Catherine A. La Fleur, Honorable Jeffrey A. Wagner, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Valirie Maxim, Sen. Grothman's office.

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:30 a.m.

II. Approval of November 16, 2012 Minutes

MOTION: Council member Stephens moved, seconded by Council member Weber, to approve the November 16, 2012 meeting minutes as submitted. Motion approved unanimously.

III. Discussion/Action Regarding Judicial Council Accessibility and Visibility
A. Publication Committee

Previously, 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. The Council voted to table most of the items proposed in the memo, but agreed that the creation of a publication committee should be placed on a future agenda for further discussion and consideration.

Council member Gleisner spoke in support of the creation of a publication committee. He proposed that the Council regularly publish articles so that the legal community will be more informed about the Council's work. He also proposed that the committee oversee the publication of the Council's agendas in the State Bar's Inside Track electronic newsletter. Council member Gleisner suggested that the publication committee should include members of the Council and an at-large member from the State Bar.

Attorney Southwick noted that Sandy Lonergan, Government Relations Coordinator with the State Bar, is now attending all the Judicial Council meetings. Ms. Lonergan also provides reports on the Council's work to the interested State Bar section boards. Attorney Southwick has observed a significant increase in her communication with members of the State Bar since Ms. Lonergan has assumed her new role.

Council member Shriner noted that the Council diligently publishes its meeting agendas, posts its meeting minutes on its website, sends out requests for feedback on proposals it has drafted, and publishes articles on its work product when new rules or statutes are adopted. He suggested that if members of the State Bar are unaware of the work of the Council, it is probably because they are not interested. Council member Roggensack suggested that the Council could publish an article on its work and see whether it generates comments or interest from the Bar.

Council member Wagner agreed with Council member Shriner, and she added that the Council is a work group. The Council does not have authority to adopt any of its proposal. The Council's work product must go through either the supreme court or the legislature for approval before it becomes a rule or a statute.

Council member Ptacek stated that council members all represent various constituencies, and they have a responsibility to keep their constituents informed. A publication committee might detract from that responsibility.

Council member Stephens opposed publishing articles opining on work that is still ongoing in a committee. She stated that it is often difficult enough to achieve consensus within the committee, without additional pressure from outside entities. She suggested that comments and feedback from outside groups should not be solicited until the committee has agreed on a recommendation. At that point, the committees generally seek feedback from interested parties and use those comments to further revise their proposals prior to submission to the full Council. She also added that Attorney Southwick writes articles about the Council's work, and she collaborates with Council members and others on articles about the Council.

Attorney Southwick provided a brief summary of the Council's work process, including the points in the process at which outside feedback is sought and articles are published. She encouraged members to volunteer to assist her with writing articles to submit for publication.

MOTION: Council member Gleisner moved, seconded by Council member Roggensack, for the formation of a publication committee. Motion failed.

Greg Weber asked whether any research was done regarding whether a private citizen can donate to the Council. Attorney Southwick reported that since the Council voted not to pursue that portion of Council member Gleisner's proposal, she did not conduct any additional research. If the Council would like to reconsider that issue, she will obtain more information regarding the limitations. The Council took no further action.

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

Professor Schultz reported that Attorney Southwick continues to work on a redlined version of the bill that will be easier to read and comprehend. It will also make it much easier for the workgroup to complete its final edits. Attorney Southwick anticipates that the redlined draft will be completed prior to the criminal procedure committee's meeting on February 6th.

Professor Schultz and Attorney Southwick attended the State Bar criminal law section board meeting in early December to give them a report and presentation on the bill.

Attorney Southwick reported that Judge Rebecca St. John has requested that the Council give a presentation on the bill to Dane County lawyers and judges. Council member Wagner suggested that members could also conduct presentations at various district meetings for judges. The judges could also invite the local prosecutors and defense attorneys to attend. Council member Voelker added that the criminal law and sentencing judicial seminar is May 15-17 in Stevens Point. He suggested it might be an appropriate venue to provide information on the proposed amendments. Members noted that it may create a conflict with the Council's May 17th meetings.

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. Two estimates have been received to date. The district attorneys' have asked to see copies of the completed estimates. The fiscal estimates are confidential at this point in the process because the bill has not been introduced yet. Therefore, the Department of Administration cannot release copies without Council approval. Attorney Southwick was unaware of any reason not to release copies of the estimates, but asked the Council to make the determination.

Council member Stephens asked Council member Ott if he is aware of any legislative concerns associated with releasing copies of fiscal estimates prior to introduction of the bill. He indicated that unless there are very significant negative fiscal effects associated with the bill, he does not anticipate any problems releasing the information.

MOTION: Council member Pliskie moved, seconded by Council member Wagner, to approve the district attorneys' request to view the fiscal estimates that have been received to date. Motion approved with Council member Schultz opposed and Council members Ott, Roggensack and Stephens abstaining.

VI. Discussion of Wisconsin Rules of Evidence

A. Wis. Stat. § 906.09, Impeachment by Prior Conviction

Prior to the meeting, Attorney Southwick circulated a memorandum and recommendation from the Evidence & Civil Procedure Committee with regard to proposed amendments to s. 906.09, impeachment by prior conviction.

Attorney Southwick provided a brief summary of the project's history. She noted that the committee's original recommendation to the Council included a revision to s. 906.09 (2) to add specific factors for court consideration prior to making a determination on the admissibility of evidence of a prior conviction. The Council referred the rule back to the committee for further study regarding amending sub. (1) to more accurately reflect case law and current practice.

The Evidence & Civil Procedure Committee studied sub. (1) and reviewed relevant case law. The committee considered two potential amendment options based on language borrowed from case law. Once the committee reached agreement, it forwarded a draft of its recommendation to the Criminal Procedure Committee for feedback. The Criminal Procedure Committee preferred the other drafting option that was considered. The Evidence & Civil Procedure Committee reviewed the reasons given by the Criminal Procedure Committee in support of the alternate option and agreed to change its position. The two alternatives are contained in the memo that was provided to the Council.

Council member Shriner discussed the differences between federal practice and Wisconsin practice. He expressed his support for the committee's recommendation because it aligns the statute more closely with actual practice, and provides specific factors to aid the court in determining whether the probative value is substantially outweighed by the danger of unfair prejudice.

Council member Blanchard expressed concern with the use of the phrase "If the witness's answers are truthful and accurate..." He observed that often the court excludes some offenses or the parties stipulate to a number of convictions. The agreed upon number may not be technically truthful or accurate. He distributed written comments and suggestions for further revision to the committee's recommendation.

MOTION: Council member Schultz moved, seconded by Council member Ptacek, to adopt the committee's recommendation. Council member Shriner requested a friendly amendment to the motion to refer the rule back to the committee to review and respond to the comments and suggestions from Council member Blanchard prior to adopting the recommendation. The amendment was accepted. The amended motion was approved with Council member Ott abstaining.

VII. 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. The committee will meet later today to continue discussing and drafting a proposal.

B. Criminal Procedure

Committee Chair Stephens reported that the committee met on January 2nd. The committee continued to discuss plea procedure and withdrawal when the court is not going to follow the recommendation of the prosecutor.

At its next meeting, the committee will discussed the redlined draft of the criminal procedure code amendments that Attorney Southwick is preparing because it will much easier to read than the current bill draft. It is important for committee members to understand the changes contained in the bill so that they can talk with interested groups and their constituents about the proposed amendments.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee will meet later today to review its recommendation regarding Wis. Stat. § 906.09, Impeachment by Prior Conviction, in light of the suggestions and comments provided by Council member Blanchard.

The committee also 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 feedback from interested parties has highlighted a collateral consequence of the case law: There is a perceived difficulty in obtaining expert testimony in certain types of cases, such as workers' compensation. The committee is going to explore whether the issue can be addressed through an amendment similar to Rule 45(c) of the Federal Rules of Civil Procedure, which is the rule regarding subpoenas.

The committee may also continue discussing a possible amendment to Wisconsin's class action rule to bring it in line with its federal counterpart.

IX. Other Business

A. PPAC Liaison's Report

Council member Voelker reported that PPAC's last meeting focused on prioritizing the action steps from the critical issues report that was previously prepared. He anticipates that they will review the subcommittee's rule recommendations regarding limited scope representation at the next meeting.

B. Council Attorney's Report

Attorney Southwick introduced Sen. Grothman, the Judicial Council's newest member. The Council talked with Sen. Grothman about his thoughts and priorities as the new chair of the Senate judiciary committee.

IX. Adjournment

The Council adjourned by consensus at 10:55 a.m.