

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 15, 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, Catherine A. La Fleur, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Jeffrey A. Wagner, Honorable Mary K. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Tracy K. Kuczenski, Honorable Patience Roggensack, Brad Schimel.

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. Members introduced themselves to new members Judge Jeff Wagner and Dennis Myers.

II. Approval of January 18, 2013 Minutes

The January 18, 2013 meeting minutes were approved by consensus without amendment.

III. Discussion/Action Regarding Structured Settlements

Attorney Southwick explained that Council member Ptacek recently conducted two hearings on petitions to approve the transfer of structured settlements. In those cases, unrepresented individuals sold their structured settlements to a company and an attorney for that company sought court approval. This was in part to meet the IRS requirements to avoid a 40% excise tax. Because Wisconsin does not have any statutes regarding the sale of structured settlements, the pleadings all relied on federal and non-Wisconsin state statutes. Council member Ptacek asked whether Wisconsin needs a statute and, if so, is it an appropriate project for the Judicial Council.

Prior to the meeting, Attorney Southwick conducted some research on the issue and circulated a brief memorandum regarding structured settlements. She noted that New Hampshire and Wisconsin remain as the only states without structured settlement protection acts. Members discussed the basis for the court's authority to approve an agreement to sell a structured settlement. Members asked which party is liable for payment of the tax if they fail to obtain court approval. Attorney Southwick will conduct additional research to obtain an answer.

Judicial members noted that these cases generally involve unsophisticated, unrepresented parties who need the money. They suggested that it would be helpful to have some guidance regarding when it is appropriate for a court to approve or deny an agreement, so that the courts are in a better position to protect vulnerable individuals. Council member Weber suggested that the Council study California's statute and the criteria for making a "best interest" determination. Attorney Southwick will obtain more information.

Council member Ott suggested that the legislature would appreciate a recommendation from the Judicial Council on this issue. Council member Stephens located a previous attempt at legislation in 1999. She suggested that it might be a controversial issue because 1999 SB 298 died in committee. Attorney Southwick will conduct additional research on the legislative history.

Attorney Southwick will obtain the requested information, and the Council will continue to discuss this issue at its next meeting.

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

Council member Schultz reported that Attorney Southwick has completed a redlined version of the bill. The redlined version makes it easier for a reader to easily locate and comprehend the amendments contained in the bill. The reader can also clearly see how the bill will change current law. Attorney Southwick has not distributed the redlined version to all members because it is still over 300 pages in length. If any member would like a copy, please request one from Attorney Southwick.

Attorney Southwick has compiled a list of the remaining questions and comments from the LRB drafters. The new redlined version of the bill will make it much easier for the workgroup to complete its work. The workgroup intends to complete its responses to the LRB drafters prior to the next Council meeting.

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

At the Council's request, the Department of Administration previously circulated the presentence investigation report bill for fiscal estimates. Attorney Southwick reported that the Department of Corrections (DOC) submitted a fiscal estimate. DOC identified only two discrete sections of the bill that will have a fiscal impact. DOC projected increased costs for obtaining copies of court transcripts to determine the accurate factual basis for the finding of guilt. The Council disagreed that the amendment requires DOC to obtain a court transcript because counsel can and is required to provide the needed information. DOC also projected increased costs for extended jail time caused by delays in scheduling due to defense attorneys being permitted to attend the PSI interview with the defendant. DOC projected increased time involved in preparing a report under the proposed amendments, but stated that the department may be able to absorb that workload with existing resources.

Attorney Southwick reported that the Council is still waiting for fiscal estimates from the courts and the district attorneys. The Council discussed the anticipated timing for introduction of the bill, and recognized that introduction is unlikely until after the legislature finishes the budget.

VI. Discussion of Wisconsin Rules of Evidence

Attorney Southwick provided a progress report on the status of the review and amendment of the rules of evidence. The project is nearly complete with only a few remaining rules to study. She asked members to begin thinking about a plan to move forward with the project. Some of the recommended amendments will require legislation, although most can be adopted through a supreme court rule change. The Council discussed whether the recommendations should be bundled together into one rule change petition, or whether the rule amendments should be pursued individually or possibly grouped by chapter.

Council member Ott asked whether any of the proposed amendments involved technical changes or whether they are all substantive. Attorney Southwick stated that the recommendations are all substantive.

Council member Shriner asked for an update on the spoliation issue. Attorney Southwick reported that spoliation/preservation is the third and final step in the Council's work regarding the discovery of electronically stored information. Step 1 involved the Council drafting amendments to the discovery rules to incorporate rules addressing electronically stored information. Those rules were adopted by the supreme court two years ago. Step 2 involved the Council drafting rules to address inadvertent disclosure of privileged information. Those rules were adopted by the supreme court last year. The spoliation/preservation issue is the third and final part of the project. The Evidence & Civil Procedure Committee tabled its discussion on spoliation pending the release of a draft federal rule. A draft was expected to be released for comment a year ago, but its release continues to be delayed. Council member Shriner suggested that Wisconsin probably does not want to adopt a rule that differs from the federal rule, so he favored waiting for a federal recommendation. Council member Gleisner believes it could be another year or two before a federal spoliation rule is released. He suggested that the Council could recommend adopting the current federal rule, and then an amendment could be recommended when the federal rules are updated.

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 February 6th. The committee has begun reviewing the redlined criminal procedure draft prepared by Attorney

Southwick. The newer committee members were not involved with drafting the criminal procedure bill. The redlined draft will help them become more knowledgeable about the bill's content so that they can talk with groups about the changes and respond to questions.

The committee continued to discuss plea procedure and withdrawal when the court is not going to follow the recommendation of the prosecutor. Currently, some courts allow plea withdrawal, while others do not. The committee is discussing whether there should be standards or criteria set forth in a rule.

The committee previously tabled its discussion regarding procedural concerns related to police searches using GPS technology, pending the Wisconsin Supreme Court's release of its latest opinion on the subject. The court released the opinion (*State v. Brereton*) last week. The committee will continue to discuss reasonable expectations of privacy and procedural concerns related to GPS technology. In *Brereton*, the police stopped a vehicle with the intent to install a GPS tracking device. Officers then moved the vehicle to another location to install the device. The officers obtained a warrant, but not prior to moving the vehicle. In addition, the warrant did not accurately describe the GPS device that law enforcement actually used. Council member Weber asked whether the legislature is still considering a statute to address the private use of GPS devices. Council members Ott and Grothman were unaware of any bills currently under consideration.

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. If the committee approved the revised proposal, it will forward it on to the full Council to consider at its next meeting.

The committee also continues to discuss the holding in *Alt v. Cline*, 224 Wis.2d 72. Members are studying whether to recommend codification of a privilege permitting experts to refuse to testify in certain circumstances. The committee is also looking to Rule 45 (Subpoenas) of the Federal Rules of Civil Procedure to provide a possible resolution to this issue.

The committee is also studying an amendment to Wisconsin's class action rule to bring it in line with its federal counterpart. Attorney Southwick prepared a 50 state survey, and the committee will begin discussing it at today's meeting.

VIII. Other Business

A. PPAC Liaison's Report

Council member Mary Wagner reported that the last PPAC meeting focused on treatment courts and prioritizing PPAC recommendations. Members talked about the expanded use of treatment and specialty courts. Judicial members suggested that for appropriate cases, they can be more efficient and effective than traditional models.

B. Council Attorney's Report

Attorney Southwick noted that she included a recently filed supreme court rule change petition and order along with the Council's packet that was distributed prior to the meeting. She routinely receives copies of these documents from the court, and forwards it to Council members for informational purposes. If any member would like the Council to discuss or comment on any issues raised in a petition, please request that it be placed on a future meeting agenda for further discussion.

Council member Shriner noted that some counties still do not have rules governing motion practice. He suggested that the Council consider recommending minimal procedures, as least in civil cases. Council member Schultz stated that the Council previously considered this issue, although he could not recall the outcome. Attorney Southwick will obtain more information regarding the Council's previous work on this issue.

IX. Adjournment

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