

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
March 21, 2014

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, Hon. Michael Fitzpatrick, William Gleisner, Tracy K. Kuczenski, Devon Lee, Dennis Myers, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Honorable Jeffrey A. Wagner, Greg M. Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: George Burnett, Senator Glenn Grothman, Representative Jim Ott, Benjamin J. Pliskie, Honorable Patience Roggensack, Brad Schimel, A. John Voelker, Amy E. Wochos.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan and Cale Battles, Wisconsin State Bar; Adam Gibbs, Senator Grothman's office.

I. Call to Order and Roll Call

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

II. Approval of February 21, 2014 Minutes

MOTION: Council member Myers moved, seconded by Council member Wagner, to approve the February 21, 2014 minutes. Minutes were approved unanimously without amendment.

III. Appointment of a Nominating Committee

Attorney Southwick explained that the June meeting is the Council's final meeting of the year. (The Council traditionally meets monthly from September through June.) The June meeting is also a special event at which the Council recognizes all its ad hoc members who served on the various committees, as well as an opportunity to honor departing members who have completed their terms of service. Current and former Council and committee members, as well as other special guests will be invited to attend a reception held prior to the Council's June 20, 2014 regular meeting.

Each year, a nominating committee is tasked with nominating candidates to serve as chair and vice chair for the upcoming Council year. The nominating committee announces its recommendation at the June Council meeting. The committee generally consists of three members. Chair Bertz asked for volunteers to serve on the committee. Council members Myers and Wagner volunteered. Attorney Southwick will send an email requesting an additional volunteer to serve on the nominating committee. Chair Bertz will formally appointment the

committee at the next Council meeting on May 16, 2014. The committee will be asked to make its leadership recommendations at the June 20, 2014 meeting.

IV. Discussion and/or Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure

Vice Chair Blanchard provided a report in his capacity as chair of the newly reorganized Criminal Procedure Committee. The committee had its first meeting on March 11, 2014 and adopted guidelines and goals for reviewing 2013 Assembly Bill 383 and recommending additional amendments. The committee intends to complete its work on AB 383 and send its recommendations to the full Council by the September 2014 meeting. To aid the committee in meeting its deadline, members agreed to create a workplan that will include all of the sections of AB 383 that will be subject to further study by the committee. The committee set a deadline of March 28th for members to submit sections for inclusion in the workplan, along with a brief explanation regarding why they believe the provision should be revised and proposed drafting language, if possible. Once the committee approves the workplan, members will decide how many additional summer meetings they will need to schedule to complete their work by September.

Council member Shriner inquired how the committee intends to take into consideration concerns expressed by stakeholders in the justice system who may not have a representative on the Council. Attorney Southwick explained that the membership of the Criminal Procedure Committee has been greatly expanded through the appointment of ad hoc members representing stakeholder groups who have offered comments or expressed concerns about certain provisions in the bill. The Department of Justice, State Bar Criminal Law Section Board, Wisconsin Association of Criminal Defense Lawyers, and the Wisconsin District Attorneys Association have all nominated representatives to serve on the committee for this project. Council members Ott and Wagner have also joined the committee. Attorney Southwick expressed some concern about the extent of WDAA's participation. At the committee's first meeting, WDAA was represented by its president-elect, Dave O'Leary, although Attorney O'Leary indicated that current WDAA president Adam Gerol would probably be the designee to the committee. A few days after the meeting, Attorney Gerol visited the Council office and stated that he is concerned about the workload that will come with participating on the committee. He offered to provide input on the bill, but was reluctant to commit to serving as a committee member. Attorney Southwick encouraged him to reconsider, stressing how important it is that the district attorneys participate fully in the process. During the Council meeting, Council member Schimel sent a message reporting that Attorney Gerol has agreed to participate on the committee.

Attorney Southwick stated that she is very pleased with the balanced membership on the committee. It currently consists of four prosecutors (two members from the Department of Justice and two district attorneys), four defense attorneys (two members from the Public Defender's office and two private practice attorneys, and four "neutral" members (two judges, a law professor, and the Assembly judiciary committee chair). The assistant district attorneys' organization (Association of State Prosecutors) has also approached her about appointing a designee to the committee. If ASP designates another prosecutor, Attorney Southwick will find another defense attorney to participate on the committee so that the membership remains

balanced. Council member Weber voiced his strong support for including the ASP. He also added that DOJ's ad hoc designee on the Criminal Procedure Committee (Roy Korte) serves as an ad hoc member of WDAA's executive board, so he will be aware of concerns raised by WDAA.

V. Discussion and/or Action Regarding Potential Project
A. Wis. Stat. § 814.04, Items of costs

Former Judicial Council Chair Beth Hanan previously suggested that the Evidence & Civil Procedure Committee propose amendments to Chapter 814 to permit recovery of e-discovery costs, in light of *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (May 6, 2011). The Evidence & Civil Procedure Committee considered the issue. The committee also asked the State Bar Litigation Section to make a recommendation regarding whether the Council should take up the proposed project. Both the Litigation Section and the Evidence & Civil Procedure Committee recommended that the Council study Wis. Stat. § 814.04. However, shortly after that recommendation, *Race Tires America, Inc. v. Hoosier Racing* was appealed, so Attorney Southwick delayed forwarding the potential new project to the Council for consideration until after an appellate opinion was released. Ultimately, the Third Circuit Court of Appeals concluded that of the numerous services the vendors performed in the case, only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved “copying,” so the costs attributable to only those activities were recoverable.

Attorney Hanan originally proposed the project because the holding in *Race Tires America, Inc. v. Hoosier Racing* was inconsistent with Wisconsin case law. In Wisconsin, the court of appeals has considered whether the cost to scan and make an image of a document before producing it was the same as a cost for “photocopying” and thus should be a taxable cost under Wis. Stat. § 814.04 (2). However, in *Zurich Am. Ins. Co. v. Wisconsin Physicians Servs. Ins. Corp.*, 2007 WI App 259, ¶ 35, the court declined to recognize it as a taxable cost. The Wisconsin court ultimately concluded that “unless the legislature revises the statute to add electronic reproduction/imaging to the statute as an item of cost, imaging costs do not fall within the costs statutes...” Attorney Hanan suggested that the Judicial Council study whether the time has come to propose a revision to the statute.

Council member Gleisner spoke in support of accepting s. 814.04 for further study. He suggested that part of the current problem stems from the definitions contained in the statute. Council member Shriner agreed, but suggested that the study of s. 814.04 should not be limited to e-discovery costs. He agreed that not all costs should be shifted to the losing party, but he felt that the current dollar limits in the statute are likely out-dated and should be studied.

Council member Fitzpatrick suggested that the phrase “postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery” is confusing. The statute does not define “electronic communications” or elaborate on what type of fees should be included.

Council member Gleisner noted that the federal case law regarding costs is not uniform,

but he agreed that the Wisconsin statute should be updated. He supported a comprehensive study of items of costs under s. 814.04 in light of recent case law in other jurisdictions.

MOTION: Council member Gleisner moved, seconded by Council member Myers, to refer s. 814.04, including any related statutes, to the Evidence & Civil Procedure Committee for further study and a recommendation. Motion approved unanimously. The Council clarified that the scope of this project does not extend to costs in criminal cases.

VI. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee did not meet last month, but it is scheduled to meet following the Council meeting. The committee will continue to work on the issue of prisoner challenges to agency decisions. The Legislative Reference Bureau (LRB) has completed a preliminary draft bill consolidating the rules into one subchapter of the code. The committee will also continue to study Rule 809.15, the record on appeal. The State Bar Appellate Practice Section Board has designated an ad hoc member to assist with the study of Rule 809.15.

B. Criminal Procedure

Committee chair Blanchard reported that the committee has put its other work on hold to focus on the criminal procedure bill. An update on that project was provided earlier in the meeting. Attorney Southwick suggested that the Council and committee might want to consider incorporating amendments or additional rules regarding law enforcement's use of GPS and other tracking devices into the criminal procedure bill prior to its reintroduction next session. Adam Gibbs stated that Senator Grothman has been working on this issue and would be interested in hearing the Council's recommendations.

C. Evidence and Civil Procedure

Committee chair Shriner reported that committee members Bill Gleisner and George Burnett have agreed to work together to draft a proposed rule to codify case law regarding the expert witness privilege created in *Alt v. Cline*, 224 Wis.2d 72. They expect to have a draft ready for committee review at the May 16th meeting.

The committee tabled the issue of spoliation and preservation of evidence because a federal rules advisory committee is also studying the issue. The federal committee recently received comments and public testimony on a proposed rule draft. The Evidence & Civil Procedure Committee decided to table its study until the federal committee reviews the comments and issues a recommendation. Attorney Southwick provided a brief summary regarding the current federal rule (Rule 37) and the proposed amendments that would extend its applicability to all discovery, not just electronically stored information.

Council member Weber inquired as to whether the federal committee is considering changes that will affect criminal cases. Attorney Southwick responded that the rule the Evidence & Civil Procedure Committee has been monitoring is a civil rule, although there may be another federal committee recommending changes to the Federal Rules of Criminal Procedure. Judicial members supported the committee's continued work regarding preservation and spoliation because the issue frequently arises in litigation and some members felt that the current rules and case law provide the courts with insufficient guidance. In addition, there is still a great deal of confusion regarding the preservation of and admissibility of certain types of electronic evidence such as text messages.

At its meeting following the Council meeting, the committee will consider written comments it received in response to possible amendments to Wis. Stat. § 885.205 regarding privileged communications between students and deans and school psychologists. The committee had been discussing repeal of s. 885.205 or its possible incorporation into Wis. Stat. § 905.04, physician-patient privilege. However, school psychologists have expressed an interest in preserving the current rule with minor amendments, so committee members will consider their position and proposal at today's meeting.

VII. Other Business

A. PPAC Liaison's Report

Council member Blanchard reported that PPAC has a meeting scheduled for later in the day. He stated that the Director of State Courts has been conveying information about the court's budget crisis. Because funding from the State has continued to decline in recent years, courts have had to rely more heavily on funding from the counties. Counties are facing budget concerns of their own so it is becoming increasingly difficult for courts to obtain sufficient funds to provide the level of service that citizens deserve. Currently, only 0.85% of the State's annual budget goes to the court system. If that number increased to 1%, the court would be fully funded. Members discussed areas where cuts are already being observed. Attorney Southwick noted that the court system has vacancies in many key positions. Council member Fitzpatrick stated that a lack of funding is also negatively affecting judicial education.

B. Council Attorney's Report

1. Crime Victim Identity Rule Change Petition

Attorney Southwick reported that she has been asked to attend the State Bar Board of Governor's meeting in June to discuss the Council's petition to protect crime victim identity in appellate briefs and opinions.

Attorney Southwick updated the Council on the status of the Council's two pending supreme court rule change petitions, noting the agendas for the supreme court's recent administrative conferences have been quite long. At recent administrative conferences, the court has not reached any discussion on the two petitions filed by the Council. She could offer no estimate regarding when the court will have a preliminary discussion on whether to set the

Council's petitions for a public hearing. She stated that she has had several inquiries regarding the status of the petition on crime victim identity and she cannot speculate regarding when a public hearing might be scheduled.

VIII. Adjournment

The Council adjourned at 10:45 a.m.