

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
May 18, 2012

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 Rebecca R. St. John, Christine Rew Barden, Honorable Brian W. Blanchard, William Gleisner, Cathlene Hanaman, Catherine A. La Fleur, Honorable Mark Mangerson, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, A. John Voelker, Honorable Mary K. Wagner.

MEMBERS EXCUSED: Allan M. Foeckler, Marla J. Stephens, Honorable Maxine A. White Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Adam Plotkin, State Public Defender's Office.

**I. Call to Order, Roll Call and Introductions**

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

**II. Approval of April 20, 2012 Minutes**

MOTION: Council member Gleisner moved, seconded by Council member La Fleur, to approve the April 20, 2012 meeting minutes as submitted. Motion approved unanimously.

**III. Appointment of Nominating Committee**

Three members previously volunteered for the nominating committee. Chair Bertz appointed Council members Shriner, Gleisner and White to the committee, and designated Council member Shriner as the chair. The committee is tasked with making a recommendation at the June 15<sup>th</sup> meeting for the position of chair and vice chair of the Judicial Council for the 2012-2013 Council year. Council member Shriner asked members to let the committee know if interested in serving as chair or vice chair of the Council.

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

At the previous meeting, Council member Schultz explained that the workgroup recommended that the full Council determine how best to proceed with the *Lehman/Avery* issue regarding dismissal of alternate jurors and substitution of jurors after deliberation has begun. The issue is not squarely addressed in the current bill draft. In both the *Lehman* and *Avery* cases, a juror was dismissed during deliberations. In *Avery*, an alternate juror who had not been dismissed was sequestered. The judge allowed the sequestered alternate juror to substitute for the dismissed juror, with the consent of both parties. The statute regarding alternate jurors states

that they are to be dismissed at the time the cause is submitted to the jury. That process was not followed in either *Lehman* or *Avery*.

The workgroup felt that both *Avery* and the amended federal rule allowing substitution should be considered (both of which were subsequent to the committee's original draft upon which the bill is based). However, the workgroup identified a number of additional issues to consider when drafting a rule addressing *Lehman* and *Avery*, and felt that it should be further studied and addressed by the full Council. Council member Shriner agreed that the issue should be addressed by the draft bill to reduce the likelihood of mistrials.

Prior to the meeting, Attorney Southwick distributed a research memorandum on the *Lehman/Avery* issue, as well as a memo on the history of the federal rule amendment. Attorney Southwick explained that current law is silent regarding a remedy when alternate jurors are not dismissed at the time the case is submitted to the jury. Current law also does not address whether, when or how to substitute an alternate juror once deliberations have begun. The proposed draft prohibits further participation of an alternate juror after the juror has been dismissed.

Judicial members of the Council explained that in current practice, trial judges frequently hold alternates after deliberations have begun, in case they are needed. Substitution is allowed if the alternate has followed the prohibitions such as not discussing the case with anyone. The parties must stipulate to the substitution, and the jury is instructed to begin deliberations anew. Council member Ptacek noted that the longer the trial, the more important substitution is for judicial economy. Council member Shriner agreed that the rule should allow substitution after deliberations have begun, but it should not be dependant upon the agreement of the parties. He favored a rule such as the federal model. Council member St. John agreed and stated that the federal rule gives judges discretion to make a case-specific determination. Council member Wagner supported giving the court more discretion. Council member Ptacek suggested that more discretion might also result in more appeals.

In the absence of Council member Stephens, Adam Plotkin was present on behalf of the State Public Defender. He stated that the Public Defender would prefer a rule that requires a stipulation by both parties to substitute an alternate. Members discussed whether a colloquy would be required. Members also discussed whether the alternate should remain sequestered. Members generally agreed that if a stipulation is required, it should be obtained prior to the selection of the alternate and the commencement of deliberations. Council member Shriner opposed requiring consent of the parties. Members discussed whether a stipulation could result in a successful ineffective assistance of counsel claim, and whether defense attorneys would be trained to never stipulate to a substitution.

Council member Wagner cautioned that the rule should not make it too easy to substitute a juror. Council member Shriner stated that the judge would still be required to make a record to support the dismissal of a juror. Council member Shriner suggested that the Council review a draft based on the federal model.

**MOTION:** Council member Shriner moved, seconded by Council member Schimel, to study and adopt a rule based on Rule 24(c)(3) of the Federal Rules of Criminal Procedure. Motion approved unanimously.

Council member Schultz asked for additional clarification regarding whether the draft rule should address issues such as instructions to the alternate, sequestration, personal inquiry of defendant, and questioning the juror prior to dismissal. Council member Wagner suggested that the federal rule adequately addresses most of these issues. Attorney Southwick noted that the U.S. Supreme Court has not addressed the constitutionality of the federal rule. Based on her research, the issue reviewed by appellate courts at the federal level is typically whether the substitution was prejudicial to the defendant.

Council member Schultz noted that Wisconsin law allows deliberations to proceed with a jury of less than twelve with agreement of the parties. He asked members to consider whether that rule would conflict with the proposed rule regarding substitution.

Attorney Southwick will work with Council member Schultz to prepare a draft rule for the Council's review and continued discussion at the June meeting.

## **V. Committee Reports**

### **A. Appellate Procedure**

Vice Chair St. John reported that the Appellate Procedure Committee met last month and continued to discuss protecting victim identity in appellate documents that are publically available via the internet. The committee will continue to work on that issue at today's meeting. The committee is also working with the Legislative Reference Bureau to prepare the analysis to the presentence investigation report bill.

### **B. Criminal Procedure**

Committee Chair Schultz had no further report. Attorney Southwick stated that she was invited to make a presentation on the criminal procedure bill at the Chief Judges' meeting on June 7, 2012 in Elkhart Lake. Council member Stephens has agreed to assist with the presentation.

### **C. Evidence and Civil Procedure**

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee continues to discuss a draft proposal 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 will also continue its discussion of s. 906.09, impeachment by prior conviction. Professor Dan Blinka, Marquette University Law School, attended last month's meeting to share his thoughts regarding the *Alt* codification and s. 906.09 (1). The committee will review a revised draft of the *Alt* proposal at today's meeting.

## **VI. Other Business**

### **A. PPAC Liaison's Report**

Council member Voelker stated that PPAC has not met since the last Judicial Council meeting so there was no report.

### **B. Assembly Judiciary Committee Report**

At Council member Ott's request, Attorney Southwick distributed copies of Assembly Bills 207 and 208, which increase the penalties for OWI. AB 207 criminalizes first offense OWI at a blood alcohol content of .15. AB 208 makes a third offense OWI a felony and increases the penalties for each repeat offense by one level. The goal of the proposed legislation is to deter drunk driving and prevent repeat offenses. Council member Ott asked members to share their thoughts on the proposed changes.

Members discussed how Wisconsin's current penalties compare to other states, as well as the potential impact the changes could have on the justice system. According to 2009 data, there were 23,056 convictions for OWI and over half of those had a BAC exceeding .15. Additionally, 1,371 OWI convictions were fifth or higher offenses. Forty states have a criminal penalty for first offense OWI. Jail sentences range from 2 days to 195 days. Most first offenses in Wisconsin are currently prosecuted in municipal courts. Municipalities generate revenue from the prosecutions and that money helps support the cost of local law enforcement. If first offenses exceeding .15 are criminalized, they will be prosecuted in circuit court with a lot of the revenue going to different sources. Council member Schimel suggested that criminalizing first offenses could reduce the funding to local law enforcement, resulting in fewer OWI citations. The number of people drinking and driving may remain the same, but fewer of them will be caught.

Judicial members noted that currently most first offenders hire an attorney to appear on their behalf. They suggested that when offenders are able to avoid appearing in front of a judge, it negates the seriousness of the offense. Also, the court does not get the opportunity to personally inform the defendant of the requirements due to the conviction, as well as the assessment and fines. They suggested that legislation requiring all OWI defendants to appear in court would allow the judge to warn them of the seriousness of the offense and advise them of the penalties of any subsequent convictions. This change might act as a deterrent with no added strain on the justice system and no additional costs.

Adam Plotkin reported that the fiscal impact of the additional prosecution and public defender costs resulting from the two proposed OWI bills was estimated at approximately \$6 million. Council member Schimel suggested that there should be a study to determine whether criminalizing first offenses in other states has been an effective deterrent. If studies support it, the increased costs would be justified. However, he was skeptical that criminalizing first offenses will serve as a deterrent. He added that the change will significantly increase case loads for prosecutors. He cautioned that if the state increases their case load without adding additional

funding to hire more staff, district attorneys will have to decide which type of cases will not be prosecuted because most offices are already under-staffed.

Council member Wagner stated that driving under the influence of drugs is increasingly becoming a significant problem to prosecute. It can take up to twelve months to get the test results from the state lab. Many counties do not charge the offender until the test results are received. If the offender is charged and the results are not back by the trial date, the charge must be dismissed and re-filed. Council member Shriner suggested that a pretrial diversion program would be helpful.

Members discussed whether the BAC level is a question for the jury or whether a judge makes the determination prior to trial. If the case is tried as a criminal matter, and the jury finds the BAC does not exceed .15, then it becomes a civil forfeiture. How does that impact the trial?

Council member Schimel stated that the OWI treatment courts have proven to be a successful way to deter repeat offenders. Over the six years since Waukesha County has implemented the treatment court, the OWI recidivism rate for third offenders who complete the program has dropped to 8%, compared to an average OWI recidivism rate of 40%. He stated that the annual cost to operate the OWI treatment court for 55 offenders is roughly the same cost as investigating and proving one OWI homicide.

In Waukesha County, if a third or fourth time offender is found guilty, the judge imposes a jail sentence, which is probably at least 270 days. The defendant is then given the option of going through the treatment process or going to jail. The average participant is in the OWI treatment court for approximately eighteen months. They spend a minimum of 30 days wearing a SCRAM bracelet, which is an alcohol use monitoring system. Participants are in court every week and meet with a case manager several times each week. They are called for random drug and alcohol testing, and are required to demonstrate to the court that they are in treatment and attending self-help group meetings. The program rewards success, but participants also suffer quick sanctions. If there is a violation, the offender will be back in front of judge within six days. The judge can immediately order the offender taken into custody.

Council member Schimel suggested that the legislature should also look at the current waiting period to obtain an occupational license. He suggested that it gives offenders the option of following the rules and losing their jobs or risk breaking the rules to keep their jobs. Members also discussed the fact that a felony conviction can cost people their jobs, too. Unemployment is not likely to promote sobriety.

Judicial members generally agreed that treatment courts have proven to be a successful, low cost method to deter repeat offenders.

## **B. Council Attorney's Report**

Attorney Southwick reported that she continues to plan for the Council's final meeting of the year. Invitations have been sent to former members and special guests. She encouraged all

members to attend the event to extend thanks to outgoing Council members and *ad hoc* committee members for their service.

**VII.           Adjournment**

The Council adjourned by consensus at 11:00 a.m.