

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
May 15, 2015

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, Honorable Michael R. Fitzpatrick, William C. Gleisner, Jill M. Kastner, Devon M. Lee, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Amy E. Wochos, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Tracy K. Kuczenski, Honorable Jeffrey A. Wagner, Greg M. Weber.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Cale Battles and Lynne Davis, Wisconsin State Bar; Kyle Koenen, Sen. Wanggaard's office; Assistant Chief Dean Collins, Brookfield Police Department; Adam Plotkin, State Public Defender's office; Aaron O'Neil, Department of Justice.

I. Call to Order and Roll Call

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

II. Approval of April 17, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Kastner, to approve the April 17, 2015 minutes. Motion approved unanimously.

III. Discussion and/or Action Regarding Bill Amending the Rules of Criminal Procedure (2015 Assembly Bill 90 and Senate Bill 82)

Council member Ott urged interested groups that worked on the bill to register with the Government Accountability Board in support of AB 90/SB 82.

A. 2015 Assembly Bill 128 and Enforcement of State Forfeiture Offenses

At the previous meeting, Attorney Southwick reported that Dean Collins, Assistant Police Chief for the City of Brookfield, contacted her regarding his concern that the statutes do not provide law enforcement with authority to enforce civil forfeiture offenses, some of which are found in the criminal procedure code. Members asked Attorney Southwick to place the issue on the May agenda for further discussion and consideration.

Assistant Chief Collins attended the meeting and gave a presentation to the Council on the issue of law enforcement's lack of authority to enforce civil forfeiture offenses. He explained that under current law, statutes provide law enforcement officers with specific authority to arrest

for the following: crimes under Wis. Stat. § 968.07, traffic regulations under Wis. Stat. § 345.22, alcohol beverage regulations under Wis. Stat. § 125.14(1), and municipal ordinances under Wis. Stat. § 800.02(6). He suggested that the statutes should be amended to specifically allow law enforcement officers to arrest a person for a law violation that is punishable by a civil forfeiture.

Assistant Chief Collins explained that “arrest” is a term of art. It does not necessarily mean that the person will be taken to jail. It is also the term that grants law enforcement the authority to stop a person, detain him or her, and investigate possible violations of the law. Assistant Chief Collins suggested that without the authority to arrest, law enforcement officers do not have authority to stop and detain a person while they obtain sufficient information to issue a citation for an offense punishable by civil forfeiture. Some examples of civil forfeitures include flying an airplane while intoxicated, possession of wild animals, intentionally disturbing human burial sites, tattooing children, transporting illegal firearms, and many election law violations. He suggested that under current law, officers do not have the authority to detain a person(s) to investigate suspected violations. A person committing any of these offenses can simply walk away and law enforcement cannot take any action.

Assistant Chief Collins explained that 2015 Assembly Bill 128 reclassifies a number of misdemeanors as civil forfeitures. Assistant Chief Collins expressed his concern that the proposed changes create many new offenses that law enforcement officers have no authority to enforce. He questioned why the legislature would create laws without granting law enforcement officers the authority to enforce them, and he asked the Judicial Council to support including an amendment to address this issue in 2015 Assembly Bill 128. He specifically proposed adding a sentence to read, “In addition to the arrest powers under s. 968.07, a law enforcement officer may arrest a person for a law violation that is punishable by a civil forfeiture if the arresting officer has reasonable grounds to believe that the person is violating or has violated the law.” He further suggested granting municipalities the authority to adopt civil forfeitures into their municipal codes by reference. That change would permit officers to issue municipal court citations as they do now for other minor offenses. He believes this change will reduce the burden on circuit courts.

MOTION: Council member Gleisner moved, seconded by Council member Pliskie, for the Judicial Council's support of the amendment proposed by Assistant Chief Collins. Council member Shriner asked for clarification regarding the term “support.” He noted that the proposed amendment language was not drafted by the Council. He expressed his opinion that this is a policy decision, so he was opposed to the Council taking a position on it. Council member Wanggaard expressed his support for the proposed amendment. He indicated that enforcement of civil forfeitures has been a problem for law enforcement officers for decades. Council member Fitzpatrick inquired as to whether the Criminal Procedure Committee has considered the proposed amendment. Council member Blanchard explained that the committee was asked to consider it as a possible amendment to the criminal procedure bill. The committee concluded that this issue should be considered in a stand-alone bill, but the committee did not discuss the specific language or take a position on the merits of the proposal amendment.

AMENDED MOTION: Council members Gleisner and Pliskie amended their motion to refer the issue to the Criminal Procedure Committee for a recommendation prior to the Council

considering whether to take a position on the issue. Council member Ott spoke in support of referring the issue to the committee for a recommendation. Attorney Southwick stated that the committee next meets on June 9, 2015, so members can consider the issue and make a recommendation prior to the next Judicial Council meeting on June 19, 2015. Motion approved with Council members Ott, Ziegler, and Wanggaard abstaining.

Council member Ptacek spoke in support of the provision in AB 121 to apply the criminal procedure rules to civil forfeiture cases. He stated that in his experience, the use of the civil discovery rules can cause considerable delay and expense if there are many discovery requests and depositions. It would be more cost-effective and efficient to apply the criminal procedure rules.

IV. Discussion and/or Action Regarding Review of Wisconsin Rules of Evidence

The Judicial Council circulated and published proposed amendments to the rules of evidence, and provided approximately two months for the public to submit comments and feedback. The comment period ended on May 14, 2015. Prior to the meeting, Attorney Southwick circulated a memo containing the questions and comments that the Council received during that period. She reported that since the memo was drafted, she received notice that the Legislative Committee of the Judicial Conference also reviewed the proposed changes, but did not provide any written comments.

Attorney Southwick stated that there were no objections to the proposed amendments. The Committee of Chief Judges had two questions. The remaining feedback was positive and in support of the changes. She recommended that the Council respond to the questions raised by the Chief Judges, and suggested that either the full Council could respond, or the Council could refer it to the Evidence & Civil Procedure Committee to prepare a response. She also asked the Council to provide direction on how it would like to proceed with the amendments, noting that they can be enacted either through a bill introduced in the Legislature, through an administrative rule change petition to the Supreme Court, or a combination of the two options. Council member Shriner suggested that if the Council refers the amendments back to the committee to prepare a response to the questions from the judges, then the committee could also make a recommendation regarding how to proceed with enacting the proposed amendments.

MOTION: Council member Myers moved, seconded by Council member Gleisner, to request that the Evidence & Civil Procedure Committee prepare a response to the questions received from the Chief Judges, and to request that the committee make a recommendation to the Council regarding how to proceed with the amendments. Motion approved with Council member Ziegler abstaining. (Council member Ott was not present for the vote.)

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to work on reorganizing the procedural rules for prisoner challenges to agency decisions. The committee is nearing

completion of a revised draft. If the committee approves the final changes at today's meeting, the committee will request that the Legislative Reference Bureau revise the draft bill accordingly.

The committee also continues to study possible amendments to Rule 809.15, the record on appeal. A draft is nearly complete, although the committee continues to wait for feedback from court clerks.

Finally, the committee is seeking suggestions for new projects. The committee has received several suggestions from the chief staff attorney for the court of appeals including: 1) late determination of restitution; 2) substitution and withdrawal of counsel in civil cases on appeal; and 3) partial appeals in bifurcated cases. Members will discuss the proposed projects and make a recommendation regarding whether they should be presented to the full Council for consideration. Council member Fitzpatrick agreed that substitution of counsel can be a difficult issue that is sometimes referred back to the circuit court to address. He stated that it can be especially hard to address when the party is incarcerated.

B. Criminal Procedure

Committee chair Blanchard reported that members have been discussing potential new projects that the committee may recommend to the Judicial Council for consideration. They are currently reviewing the issue of destruction of evidence in criminal cases in light of recent court of appeals and supreme court decisions.

Attorney Southwick reported that the committee discussed the three issues that were referred to it by the Council following the amendments to the criminal procedure bill, including preliminary examinations, search warrants and the interception of electronic communications, and discovery depositions. The committee spent two meetings discussing those issues. With regard to preliminary examinations and discovery depositions, the committee concluded that this is not an appropriate time to take up those items because there would likely be a significant fiscal impact associated with changes to those processes. Given the current economic climate, there would likely to be little support for changes that could increase costs. Therefore, the committee recommends tabling those two items.

With regard to search warrants, the request that the Council update the search warrant statutes came from the Wisconsin District Attorneys Association's representative to the Criminal Procedure Committee. Attorney Southwick followed up with a request for additional information regarding the specific problem(s) or section(s) that WDAA would like addressed. WDAA has not provided any further information or identified any specific problems. Committee chair Blanchard suggested that the "wiretap" statutes may be outdated, but committee members have been unable to pinpoint any specific problems that indicate a need for substantive changes to current law. The committee has tabled the issue pending the receipt of additional information.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to work on 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). The committee is studying Rule 23, as well as the various ways that other states have modified the federal model. Committee chair Shriner also reported that the committee will be reviewing a proposal drafted by the Wisconsin Access to Justice Commission regarding a proposed amendment to s. 803.08 to direct that a portion of any unclaimed residual funds from a class action be used to provide civil legal service for indigent parties.

VI. Other Business

A. PPAC Liaison's Report

There was no PPAC report. However, Council member Ptacek reported that the supreme court approved a new rule relating to redaction of information in court filings and court records. The rule is intended to help protect individuals' personal safety and prevent identity theft by protecting certain personal and financial information. The Director of State Courts is preparing a list of information that will be required to be redacted. The new rule will likely become effective January 1, 2016.

B. Council Attorney's Report

Attorney Southwick reported that the Attorney General held a ceremony commemorating Crime Victim Awareness Week. The rule drafted by the Judicial Council to protect the identity of crime victims was highlighted at the event. The Office of Crime Victim Services at the Department of Justice reported receiving inquiries from other states regarding the rule, so the Council's work to protect the privacy of crime victims may have a national impact. Attorney Southwick is writing an article for publication by the State Bar regarding the new rule.

The Council's annual volunteer recognition meeting is scheduled for June 19, 2015. It will be held in the Assembly Parlor again this year, unless the Legislature needs the space for budget meetings. She reminded members that the volunteer recognition meeting starts at 9:30 a.m., followed by the regular Council meeting, so members should allow extra time that day. The committee meetings will start about an hour later than usual.

Council member Ott reported that the Assembly passed 2015 Assembly Bill 129, regarding transfer of structured settlement payments. The bill has been messaged to the Senate. He extended his appreciation for the Council's work on the issue, and thanked Council members Ptacek and Fitzpatrick for their service on the Legislative Council study committee that drafted the bill.

VII. Adjournment

The Council adjourned by consensus at approximately 10:35 a.m.