

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
June 15, 2012

The Judicial Council met at 9:30 a.m. in the Assembly Parlor, 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, Catherine A. La Fleur, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Allan M. Foeckler, Cathlene Hanaman, Honorable Mark Mangerson, A. John Voelker, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Hon. Jon P. Wilcox, Supreme Court (retired); Hon. Shirley Abrahamson, Supreme Court; Sandy Lonergan, Wisconsin State Bar; Nancy Rottier, Director of State Court's Office; Beth Hanan, Gass Weber Mullins; Hon. Earl Schmidt, Reserve Judge; Lisa Roys, State Bar; Andrea Gage, State Bar; Hon. Tim Vocke, Reserve Judge; Julie Tessmer, State Law Library; Amy Crowder, State Law Library; Michael Christopher, DeWitt Ross & Stevens; Pat Fiedler, State Bar President-Elect; Eric Peterson, Office of Sen. Taylor; Hon. David Prosser, Supreme Court; Rep. Gary Hebl, Assembly; Hon. Patrick Crooks, Supreme Court; Hon. Gerald Nichol; Hon. Raymond Gieringer.

I. Introduction of Guests, Volunteer Recognition and Discussion Regarding Council Projects

Chair Bertz began the volunteer recognition portion of the meeting at 10:00 a.m. Plaques were presented to out-going Council members. All guests were introduced and asked to make a few remarks. Visiting alumni commented on their years of service on the Council. Attorney Southwick provided an update on the status of the Council's current projects.

II. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 10:25 a.m.

III. Approval of May 18, 2012 Minutes

Attorney Southwick noted that on page 5, the last line of the third paragraph should state "...one OWI homicide." Council member Schultz noted that the third sentence in the fourth paragraph on page 5 should state "The average participant..."

MOTION: Council member Schimel moved, seconded by Council member Barden, to approve the May 18, 2012 meeting minutes as amended. Motion approved unanimously.

IV. Election of 2012-2013 Chair and Vice Chair

Chair Bertz previously appointed Council members Shriner, Gleisner and White to serve on the nominating committee. Council member Shriner reported that the committee nominated Tom Bertz to serve as chair and Judge Blanchard to serve as vice chair of the Council for the 2012-2013 Council year. There were no additional nominations from the floor.

MOTION: Council member La Fleur moved, seconded by Council member St. John, to accept the nominating committee's recommendation for chair and vice chair. Motion approved unanimously.

V. Approval of 2012-2013 Meeting Dates

The Council considered the following meeting dates:

Friday, September 21, 2012
Friday, October 19 2012
Friday, November 16, 2012
Friday, December 21, 2012
Friday, January 18, 2013
Friday, February 15, 2013
Friday, March 15, 2013
Friday, April 19, 2013
Friday, May 17, 2013
Friday, June 21, 2013

The proposed meeting dates are all on the third Friday of each month. Attorney Southwick noted that the December meeting date falls the Friday before Christmas. She suggested either moving the meeting to December 14 or canceling it.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to approve the meeting dates as proposed with the exception of cancelling the December 21, 2012 meeting. Motion approved unanimously.

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

At the previous meeting, members discussed the dismissal of alternate jurors and substitution of jurors after deliberation has begun. Members asked Council member Schultz and Attorney Southwick to prepare a draft amendment to the criminal procedure bill based on Rule 24(c)(3) of the Federal Rules of Criminal Procedure for further review and discussion by the Council.

A draft dated June 1, 2012 was circulated in advance of the meeting. Council member Schultz led a discussion regarding the proposed amendment to Wis. Stat. § 972.23 to incorporate the provisions found in Rule 24(c)(3) of the Federal Rules of Criminal Procedure.

Council member Blanchard noted that there is a distinction between "alternate" and "additional" jurors. In Wisconsin, jurors only become alternates after they are retained. This may be a departure from the federal system, or at least the federal vocabulary. Council member St. John asked whether deviating from the language in the federal rule creates confusion. Council member Blanchard suggested that differentiating between the terms makes the Wisconsin rule more precise than the federal rule upon which it is based. He suggested modifying sub. (1) to read: "If the court required selection of additional jurors so that alternates may be available..." Council member Roggensack proposed that the new language should be inserted following the reference to s. 972.04 (1). Council member Ptacek suggested modifying the heading to read "Dismissal of alternate jurors." The Council discussed whether the last sentence should use "additional" or "alternate." Members agreed that "additional" was the correct term.

MOTION: Council member Shriner moved, seconded by Council member Ptacek, to approve the proposed amendment to s. 972.23, dated June 1, 2012, with the heading modified to read "Dismissal of alternate jurors" and sub. (1) modified to read: "If the court required selection of additional jurors under s. 972.04 (1) so that alternates may be available..." Council members Shriner and Ptacek later withdrew the motion. Council member Roggensack suggested limiting the motion to the amendments to the heading and the first sentence only. Council member Shriner moved, seconded by Council member Ptacek, to amend the heading to read "Dismissal of alternate jurors" and amend the first sentence of sub. (1) to read: "If the court required selection of additional jurors under s. 972.04 (1) so that alternates may be available and, at the time the case is submitted to the jury for deliberation, the number of jurors remains greater than the number of jurors required for deliberation, the court shall determine by lot which jurors shall not participate in deliberations." Motion approved with Council member Roggensack abstaining.

Members discussed the meaning and intent of the last sentence of sub. (1), which reads "For good cause and with the agreement of the parties, the court may discharge additional jurors other than by lot." Council member Blanchard suggested that the phrase "other than by lot" means another method. Council member White stated that the provision means the dismissal of a specific juror for cause such as illness or misconduct. Council member Blanchard expressed concern that the rule should not require party agreement to dismiss a juror for good cause such as an illness. The judge should have the sole discretion to make that decision.

Members discussed whether the sentence should be revised to provide for the selection of alternates other than by cause. Members agreed that the provision is intended to provide a process for dismissal other than by lot, and not retention. Council member White suggested that the phrase "and with the agreement of the parties" should be deleted. Council member Blanchard asked why the agreement of the parties was recommended by the drafting committee. Council member Schultz did not recall. Council member Stephens speculated that it may be because all the other provisions addressing modification of the jury require consent of the parties. Council member White stated that prior to the commencement of deliberations, the judge should have sole discretion to determine whether there is good cause to dismiss a specific juror.

MOTION: Council member Gleisner moved, seconded by Council member Shriner, to amend the second sentence in s. 972.23 (1) to read: "For good cause, the court may discharge additional jurors other than by lot." Motion approved with Council member Roggensack abstaining and Council member Stephens opposed.

Council member Stephens noted that the May 18, 2012 minutes reflect that the judicial members of the Council stated that current practice is to allow the substitution of a juror after deliberations have begun only with the consent of the parties. She asked why the Council determined that the proposed rule should deviate from current practice, particularly when consent of the parties is required to proceed with fewer than 12 jurors.

Council member Schultz explained that following the *Lehman and Avery* cases, which recognize that there is currently no statutory authority for substitution, consent of the parties is needed. Council member Stephens asked why consent of the parties is needed to proceed with fewer than 12 jurors, but it is not needed to substitute an alternate juror during deliberations. Council member White stated that the rights implicated are substantially different. A defendant has a right to a jury of 12 people, so the defendant must affirmatively consent to proceeding with a jury of fewer than 12. It implicates a different right than a situation in which, for example, there are 16 available and qualified jurors. The defendant participated in the process of selecting those 16 jurors. The defendant does not have the additional right to say which specific 12 out of the 16 qualified jurors will be asked to deliberate on the case.

Council member Stephens argued that once 12 jurors are selected and they begin deliberations, the defendant has a right to receive a verdict from those specific 12 people. If something happens and one of the 12 jurors is unable to complete the deliberation process, the court has three options: 1) declare a mistrial; 2) obtain party consent to proceed with fewer than 12; or 3) substitute an alternate. The defendant's consent to proceed with a different 12 jurors than originally began deliberating should be required, the same as it is required to proceed with fewer than the original 12 that were selected. Current practice is to obtain party agreement. What is the rationale for changing current practice? Council member Stephens supports maintaining current practice because once a 12-member jury has begun deliberations, substituting a different juror into the mix permanently changes the character of the deliberations. The 11 members who began deliberating together are never going to be able to disregard the influence the 12th juror, who is now gone, had on their decision-making. Even if the jury is ordered to begin deliberations anew, the alternate that is brought in after the start of deliberations will not be a party to the discussions and the thought processes that occurred prior to substitution.

Council member Stephens also noted that the constitutionality of the federal rule has not been ruled on by the Supreme Court. Federal courts reviewing the practice assess whether it was prejudicial to the defendant. The best way to insure that substitution is not prejudicial is to require party consent. Council member St. John stated that the proposed rule does not preclude the court obtaining party consent, and best practice will probably be to obtain party consent. However, this rule gives the court an additional tool to fix problems and avoid mistrials.

Council member Stephens proposed retention of current law. Council member White stated that she currently does not substitute jurors once deliberations have begun. She does not believe case law currently provides sufficient authority for the practice. Council member Stephens asked the judicial members when they would ever declare a mistrial if they have the statutory authority to substitute an alternate juror during deliberations. Council member St. John stated that members discussed that issue at the previous meeting. Judges indicated that their decision would depend upon how complicated the issues were and how long the jury had been deliberating. Council member Blanchard suggested that if jurors had been deliberating for two full days, a judge would probably determine that the jury would not be able to begin deliberations anew at that point and would have to declare a mistrial. Council member Gleisner noted that sub. (2) contains the exact language found in the federal rule so its adoption would give Wisconsin courts a body of established case law to aid in making that decision.

Council member Stephens stated that abuse of discretion is a very high standard so it is unlikely that a defendant would get relief by challenging a substitution. She questioned what scenario would result in good cause for a juror's removal and substitution of an alternate. Juror illness? Juror misconduct? She argued that the reason for the substitution is more important than factors such as the length of time that the jury has been deliberating. Juror misconduct would likely taint the entire jury so it should result in a mistrial regardless of the length of deliberations. Council member White stated that a finding of good cause for substitution will require a hearing. The parties will have an opportunity to make arguments for or against substitution during that hearing. Council member Schimel agreed that if a juror has gotten information he or she was not supposed to have and revealed it to other jurors, then the judge should declare a mistrial.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to approve s. 972.23 (1) as previously amended and sub. (2) as presented in the June 1, 2012 draft. Motion approved with Council member Roggensack abstaining and Council member Stephens opposed.

Council member Ptacek noted that this rule may result in judges retaining more alternates and holding them for longer periods of time than they currently do. This change may result in additional jury costs. Council members Wagner and White suggested that current practice will probably not change with regard to most cases. In the majority of cases, additional jurors will all be sent home once the case is ready to be submitted to the jury for deliberation. Alternate jurors will be retained only in the high profile trials that last several weeks and the court anticipates lengthy or difficult deliberations.

VII. 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.

B. Criminal Procedure

Committee Chair Schultz had no further report.

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.

VIII. Other Business

A. PPAC Liaison's Report

Council member Wagner had no further report.

B. Council Attorney's Report

Attorney Southwick stated that she and Council member Stephens gave a presentation on the criminal procedure bill at the Chief Judges' meeting on June 7, 2012 in Elkhart Lake. Since the draft bill is awaiting further amendment, she prepared a summary memo to distribute to the judges. It appeared to be well received, although the judges expressed an interest in seeing the final bill. They may ask a Council representative to attend another meeting after the bill is completed. Attorney Southwick will distribute a copy of the summary memo to all Council members.

Sandy Lonergan, State Bar, suggested that Attorney Southwick also attend a meeting of the State Bar's criminal law section to talk about the proposed criminal procedure bill.

IX. Adjournment

The Council adjourned by consensus at 11:50 a.m.