

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 18, 2015

The Judicial Council met at 9:30 a.m. in Room 328NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Chair Thomas W. Bertz, Honorable Michael R. Fitzpatrick, William C. Gleisner, Tracy K. Kuczynski, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Greg M. Weber, Amy E. Wochos, Professor Steven Wright.

MEMBERS EXCUSED: Vice Chair Honorable Brian W. Blanchard, Devon M. Lee, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Cale Battles and Lynne Davis, Wisconsin State Bar; Scott Kelly, Sen. Wanggaard's office; Erika Strelbel, Wisconsin Law Journal; Nancy Rottier, Director of State Courts Office.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:30 a.m. and members introduced themselves.

II. Approval of June 19, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Wochos, to approve the June 19, 2015 minutes. Motion approved unanimously.

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

Attorney Southwick reported that the Assembly and Senate judiciary committees held a joint public hearing on the bill on August 20, 2015. The hearing was well attended, and Attorney Southwick has received many questions from various interested groups and parties.

Council member Ott reported that he felt the public hearing went well. He has reached out to the Wisconsin District Attorneys Association (WDAA), the Department of Justice (DOJ), and the State Public Defender's office and asked them to work together to resolve any remaining concerns they may have regarding a few provisions in the bill. Legislative Council attorneys are working on proposed language to address legislative intent. He suggested that the judiciary committees would probably be ready to vote on the bill in early January, although he would like to see the executive sessions held sooner than January, if possible. If the bill passes out of committee, it may be ready for a vote in the full Assembly and Senate in March 2016.

Council member Weber reported that DOJ currently has teams from the criminal appeals unit and the criminal litigation unit evaluating the bill and making comments and suggestions. DOJ's review is collaborative with WDAA.

Attorney Southwick relayed to Council member Ott that the Judicial Council's Criminal Procedure Committee has offered its assistance if he would like help facilitating discussions, or responding to questions or concerns from the various stakeholders.

Council member Shriner expressed appreciation that the judicial committee chairs are moving the bill forward. The criminal justice stakeholders considered the criminal procedure code outdated decades ago and the code only becomes more outdated with time. He added that the longer it takes to adopt the proposed amendments, the more likely it is that administrations will change within the stakeholder groups. Every time that happens, a new person or group has to become familiar with the proposal, which further delays the process.

Attorney Southwick agreed that changes in leadership have been a significant impediment to moving the bill forward. For example, the WDAA designated a representative to serve on the Criminal Procedure Committee during the summer of 2014 to work on proposed amendments to the bill prior to its reintroduction. Leadership has since changed within the WDAA. The district attorney who testified on behalf of WDAA at the public hearing last month had no prior experience with the bill or the drafting process. He admitted during the hearing that he not even read the entire bill. Similarly, Attorney Southwick met with the president of the Wisconsin Chiefs of Police Association (WCPA) in 2013 to discuss the bill (AB 383) and its impact on law enforcement. She provided him an 80-page summary of the provisions that she felt would be of the greatest interest to law enforcement. In 2014, she notified the new president of WCPA about the Criminal Procedure Committee's on-going work on the bill and encouraged him to submit WCPA's comments to the committee. Neither former president provided any feedback when requested. WCPA now has another new president who raised some concerns about a few provisions in the bill for the first time just prior to the public hearing. He also submitted written testimony incorrectly asserting that his organization had never been consulted regarding the bill. Those two examples illustrate why it is important that the bill move forward in a timely manner before interested stakeholder groups experience even more changes in leadership that result in a greater loss of institutional knowledge about the bill.

Scott Kelly reported on behalf of Sen. Wanggaard. He agreed that the judiciary committees would probably not reach a vote until January, although Sen. Wanggaard would also like to move that date up, if possible. He added that there are a number of bills currently being circulated informally in the Legislature that address some of the same provisions amended by AB 90/SB 82, including areas such as no-knock warrants, *Shiffra-Green* issues¹, and victim compensation. Sen. Wanggaard has suggested that the authors of those bills are free to introduce them, but the judiciary committee will not be taking them up until AB 90/SB 82 is resolved. Council member Ott also indicated his reluctance to address other overlapping bills and has

¹Refers to a test established in *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) and modified by *State v. Green*, 2002 WI 68 (when the privilege holder declines to release records for review, the remedy is suppression of his or her testimony).

opposed suggestions to roll the contents of other bills into the criminal procedure code amendments.

Attorney Southwick reported that there were a couple of concerns raised at the hearing and she requested feedback or guidance from the Council. First, under current law (s. 771.06(3)) the court is prohibited from requiring the defendant to disclose his or her citizenship status at a plea hearing. AB 90/SB 82 repeals the prohibition. Attorney Southwick has been unable to locate any drafting records indicating a reason for the repeal. She is aware of case law regarding a duty to warn of potential consequences of a guilty plea, include possible deportation, but there does not appear to be any conflict with the provision in question.

Council member Shriner cited an example in which an element of the charge was that the defendant was unlawfully in the country. He stated that it can be very difficult to prove and it is sometimes proven by introducing an admission by the defendant from a prior proceeding. Council member Fitzpatrick stated that citizenship status is often raised by defense counsel. Council member Ptacek stated that if the judge asks, an answer regarding citizenship status may not be accurate, either because the defendant may not know or because the defendant may be reluctant to tell the truth. Council member VanDeHey stated that he researched Wisconsin case law and was unable to locate an explanation for adopting the prohibition or repealing it. Attorney Southwick stated that a member of the Criminal Procedure Committee raised a concern at the most recent meeting because judges can require that the defendant surrender his or her passport, which could indirectly reveal the defendant's citizenship status.

Attorney Southwick conducted some research in other jurisdictions and found several law review articles that express concern with requiring the defendant to disclose illegal citizenship status because it could potentially violate the Fifth Amendment. Attorney Southwick stated that most of the legal writing in this area comes out of other states. The Wisconsin provision is clear that it only applies at the time of entering a plea. Council member Fitzpatrick suggested that it is unlikely to infringe on constitutional rights because otherwise its applicability should be broader than the plea hearing.

Council member Weber served on the workgroup that responded to Legislative Reference Bureau (LRB) drafting questions while the initial criminal procedure bill draft was being created. He did not recall this issue being raised in the workgroup meetings. Council member Ott suggested checking with the LRB to see if there is any information in the drafting file.

Another issue that arose during the recent public hearing on the bill involves recompense. Under a 2005 amendment to s. 969.13, a forfeited cash bond can first be applied to compensate the alleged victim(s) in the form of recompense. AB 90/SB 82 repeals reference to recompense in the bail forfeiture statute and first applies forfeitures to the payment of costs. Some defense attorneys have supported the repeal because they do not believe it is fair to award the victim compensation prior to a determination of guilt. If the defendant is found innocent, can the funds be recovered from the "victim?" Some defense counsel also suggested that this is an improper use of bail. Under current law and the bill, the purpose of bail is to secure the defendant's appearance, not to compensate victims. On the other side, prosecutors note that if the defendant flees the state or the country, it is not fair that the victim cannot recover his or her damages.

Council member VanDeHey recalled that forfeited bail used to go to the county. He stated that the trend over the years had been to make courts more self-sufficient, but more and more surcharges are going to the state. The judicial members generally agreed that if the statute is not being used by the courts, it should be repealed.

The committee discussed the process to amend the bill. Attorney Southwick stated that the bill is now out of the Council's control so any amendments would need to come from the Legislature.

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

Attorney Southwick stated that she has received no further feedback on the proposed amendments. The Evidence & Civil Procedure Committee continues to discuss its recommendation regarding how to proceed with the proposed amendments. They will meet later today to continue considering the issue.

Council member Shriner stated that the committee has considered the questions raised last spring by the chief judges and is prepared to address those issues. However, the committee is still considering the issue of how best to introduce the amendments, particularly the recommended repeal of the Deadman's statutes. He provided some historical background, explaining that when the Judicial Council recommended the adoption of Wisconsin's Rules of Evidence based on the federal model, it also proposed repeal of the Deadman's statutes. However, when the supreme court adopted the rules, it did not repeal the Deadman's statutes. The supreme court and the Legislature have had over 40 years to address the issue and neither has taken action to repeal the statutes.

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 will review a revised draft bill at today's meeting, and it may be ready to forward to the full Council for review.

The committee has also been studying possible amendments to Rule 809.15, the record on appeal. A draft amendment was nearly complete, but over the summer the clerk of the court of appeals and supreme court filed a rule change petition seeking amendment to Rule 809.15 to address issues related to electronic records. With the exception of one area, the amendments requested by the court clerk generally do not address the same issues the committee seeks to address in its proposed changes. A public hearing is scheduled in October on the rule changes proposed by the court clerk.

B. Criminal Procedure

In committee chair Blanchard's absence, Attorney Southwick reported that the committee met the previous week to discuss the public hearing on AB 90/SB 82.

Members also discussed search warrants and the inception of electronic communication. The WDAA original proposed this project, asserting that the current statutes are out-dated, but they have not responded to the committee's request to identify specific problems or provisions that should be updated. Council member Stertz offered to reach out to other prosecutors to attempt to identify specific areas of concern.

Council member Stertz reported that he has not been able to identify any specific complaints from prosecutors yet, but a judge indicated his concern with the breath of search warrants for computers. Members discussed the difficulty in identifying a specific location (such as a specific drive) to search for electronic information. Council member Weber suggested that some of these issues were considered in the *Rindfleisch v. Wisconsin* case, which was appealed to the U.S. Supreme Court. The state is waiting to see whether the court will accept the case for review.

Committee members also continue to discuss possible new projects for Council consideration. The committee identified the need to reevaluate the penalties for sexual contact between consenting teenagers. The committee subsequently learned that two professors from the University of Wisconsin Law School are working with a legislator on the issue, so the committee has been following their work.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to study 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 will also take up a matter previously referred to it by the Judicial Council regarding the proposed amendments to the rules of evidence. The committee will discuss a response to the questions received from the chief judges, and discuss its recommendation to the Council regarding how to proceed with adoption of the proposed amendments. The proposed changes could be adopted by the supreme court or the Legislature, or a combination of the two.

VI. Other Business

A. PPAC Liaison's Report

Nancy Rottier reported that she provided PPAC with an update on AB 90/SB 82.

B. Council Attorney's Report

Attorney Southwick reported that the supreme court issued an order adopting the Council's proposed rule to adopt a modified version of the Uniform Interstate Deposition and Discovery Act, effective January 1, 2016. The court adopted the rule as proposed with two

minor changes. In sub. (3), the court changed "witness" to "person" and deleted a parenthetical in the accompanying comment. She extended congratulations to the Evidence & Civil Procedure Committee on the successful completion of another project. Council member Shriner expressed his opinion that the new rule is a significant improvement over current law.

VII. Adjourment

The Council adjourned by consensus at approximately 10:40 a.m.