

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 16, 2016

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Sarah Walkenhorst Barber, Sherry D. Coley, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, R. Duane Harlow, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Thomas L. Shriner, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Devon M. Lee, J. Denis Moran, Chuck Stertz.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Erika Strebel, Wisconsin Law Journal; Marisa Janssen, Winnebago County District Attorney's office.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. Members introduced themselves and welcomed new members Duane Harlow and Sherry Coley.

II. Approval of June 24, 2016 Minutes

MOTION: Council member Myers moved, seconded by Council member Wagner, to approve the June 24, 2016 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Judicial Council's 2017-2019 Budget Request

Members received copies of the Judicial Council's biennial budget request, as submitted September 15, 2016.

Attorney Southwick reported that the request to realign the Judicial Council with the Director of State Court's office for administrative purposes was considered by a subcommittee of the court's Planning and Policy Advisory Committee (PPAC) and was not recommended by the subcommittee. The proposal was considered by the full PPAC and was recommended to the supreme court. The proposal was presented to the court, along with other budget recommendations, on September 8, 2016. As of the date of the Council's meeting, the court had not taken any action on the budget. Attorney Southwick conferred with Denis Moran, Director of State Courts, and they agreed that without court approval to request the realignment, the Judicial Council should simply submit a status quo budget request. Council member Ziegler added that although the court has not taken action, she does not anticipate that the court will approve the realignment.

Attorney Southwick explained that because the court did not act on the budget items prior to the September 15, 2016 deadline for the Judicial Council to submit its biennial budget request, the Council's budget request does not include the realignment proposal. The Council's budget request is simply a status quo budget with the two standard adjustments calculated by the Department of Administration for all agencies, as authorized by the Council at its June meeting.

Members discussed the common misconception that the Council only works for the courts and some members suggested that the Judicial Council's name could contribute to that confusion. The Council noted that it has discussed that the name should more accurately reflect the fact that the Council is comprised of members of all three branches of government and is tasked with making recommendations to all three branches. However, members acknowledged that a name change is problematic since hundreds of statutes contain decades' worth of commentary and explanations that are titled "Judicial Council Notes."

MOTION: Council member Myers moved, seconded by Council member Gleisner, to approve the 2017-2019 budget request as presented. Motion approved with Council members Ziegler, Ott, Wanggaard, Barber, and Harlow abstaining.

IV. Discussion and/or Action Regarding Recommendation to Amend Wis. Stat. § (Rule) 809.107, Appeals in Proceedings Related to Termination of Parental Rights; Wis. Stat. § (Rule) 809.14, Motions; Wis. Stat. § (Rule) 809.15, Record on Appeal, and Wis. Stat. (Rule) 809.19, Briefs and Appendix; Wis. Stat. § (Rule) 809.30, Appeals in s. 971.17 Proceedings and in Criminal, ch. 48, 51, 55, 938, and 980 Cases; Wis. Stat. § (Rule) 809.32, No Merit Reports; and Wis. Stat. § 885.42, When Available (videotape procedure)

Prior to the meeting, Attorney Southwick circulated a copy of the proposed amendments with a memorandum dated September 8, 2016, explaining the proposed changes. Attorney Southwick explained the history of the projects that culminated in the recommendation. She also summarized the changes contained in the recommendation.

Council member Harlow expressed concern that s. 809.15(6) may not track with the confidentiality requirements found in s. 972.15(4m). Sec. 972.15(4m) allows a defendant to view the presentence investigation report (PSI), but prohibits a defendant from keeping a copy of the PSI. Attorney Southwick noted that proposed s. 809.15(6) states that "the defendant shall have access to the presentence investigation report so as to allow meaningful and timely review," but it does not allow the defendant to have a copy of the PSI. The accompanying Judicial Council Note specifies that the new provision "is not intended to contravene the provisions of s. 972.15."

Council member Harlow questioned why s. 809.15(6) does not use the same language as s. 972.15(4m). Attorney Southwick recalled that it was discussed by the committee, but members felt the requirements were adequately addressed in s. 972.15 and did not require repetition. Council member Ptacek agreed. Council member Shriner added that the new provision is intended to address a very specific point in the litigation, while s. 972.15 is much broader. Council member Harlow expressed concern that under the newly proposed provision, the court of appeals could provide a copy of the PSI to the defendant to keep, as opposed to

view. Attorney Southwick suggested that action would require the court to violate s. 972.15. Members discussed incorporating a reference to s. 972.15 in the text of proposed s. 809.15(6) and asked the Appellate Procedure Committee to consider that change.

Council member Fitzpatrick requested additional information regarding the proposed change to s. 885.42. Attorney Southwick explained that the committee struggled with how to address recordings in the record on appeal and in particular, the committee tried to find a solution to ensure that the appellate court considers the same information that was received in the circuit court. The committee recognized that for some recordings, the sound quality is simply too poor for the parties to agree to the content for a transcript. However, the committee felt that depositions and prior testimony were recorded in a manner conducive to preparing a transcript. Council member Ptacek supplied additional history behind this issue, noting that requiring the court reporter to transcribe audio recordings playing during a hearing or a trial can be tantamount to making the court reporter the finder of fact.

Council member Fitzpatrick expressed concern that the final sentence of the new provision in s. 885.42 does not give the circuit judges any discretion. Council member Shriner agreed and suggested that it is unclear whether the judge has discretion to alter the ten-day deadline, or whether the judge has authority to excuse the preparation of transcript, or both. Council member Ptacek stated that the Appellate Procedure Committee will review the recommendation in light of those concerns.

Council member Ziegler asked what the committee's goal was in recommending this change. Council member Ptacek responded that the goal was to require transcripts so that the transcripts are part of the record on appeal and to require that the parties clearly indicate the page and line numbers of the testimony in the transcript so that it is clear to the court of appeals exactly what testimony was offered at the circuit court. The primary goal of the committee was to make the appellate record as clear as possible.

Council member Shriner expressed concern with the additional cost involved in requiring transcripts. Attorney Southwick noted that the State Bar Appellate Practice Section Board wrote in support of the provision when the committee circulated the rule draft for feedback.

Council member Shriner raised the possibility of a future project involving rule changes to reduce the number of briefs in cases involving cross-appeals. Attorney Southwick will work with him to prepare a project proposal to present to the Council.

Council member Ptacek stated that he will explain the Council's concerns to the Appellate Procedure Committee, and ask the committee for further discussion and consideration of those issues.

V. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence, Supreme Court Petition 16-01 and 16-02

Attorney Southwick reported that in April 2016, the Judicial Council filed two supreme court petitions recommending amendments to several rules of evidence. The court set both

petitions for a public hearing on October 24, 2016. The court will be accepting written comments until September 26, 2016. The Council has until October 3, 2016 to respond to those comments. Attorney Southwick recommended that the Evidence & Civil Procedure Committee schedule an additional meeting during the week of September 26th to assist her with preparing a response. The Council approved that recommendation by consensus.

Attorney Southwick reported that the court also set an October 3, 2016 deadline to notify the court regarding appearances at the October 24, 2016 public hearing. Attorney Southwick and Tom Shriner will present the petitions to the court. Council members Fitzpatrick and Gleisner also previously volunteered to appear in support of the petitions. Council member Gleisner stated that the date might conflict with his court schedule. Attorney Southwick invited all interested members of the Council to submit written or oral comments.

Council member Shriner stated that these proposed amendments were very widely circulated and carefully considered prior to filing the supreme court petitions. He recalled that the Evidence & Civil Procedure Committee also sought participation from the Criminal Procedure Committee and specifically requested participation from the Department of Justice, State Public Defender's office, and the Innocence Project while drafting the proposed amendments to Rule 906.09, impeachment by prior conviction. Attorney Southwick stated that the proposed changes also were published last year by the State Bar, along with notice that the Council was seeking feedback on the proposed changes. The Council received no negative feedback during that vetting process, so she is optimistic that the hearing will go smoothly.

VI. Discussion and/or Action Regarding Wis. Stat. § 885.03, Service of Subpoena

At the previous meeting, the Council requested feedback from the Criminal Procedure Committee regarding current s. 885.03. Council member Blanchard summarized the project's history and reported on the Criminal Procedure Committee's discussion at its previous meeting. He noted that for both defense attorneys and prosecutors, it is uncommon to subpoena friendly witnesses, such as police officers. Prosecutors reported that they usually send subpoenas to friendly witnesses via regular mail.

Generally, subpoenas are served pursuant to the statute when there is a concern that the witness will not appear. Both prosecutors and defense attorneys generally agreed that they do not rely on leaving a copy of the subpoena at the witness's abode. They use personal service to ensure that the witness appears or preserve their ability to seek a warrant if the witness fails to appear. Therefore, committee members were generally not opposed to the removal of the language that permits leaving a subpoena at the witness's abode. No member suggested that there should be separate subpoena rules for criminal and civil cases.

Attorney Southwick reported that committee members discussed adding a provision to allow for easier, less costly service. (For example, service by email instead of regular mail.) She also noted that the State Bar Litigation Section suggested adding a provision to permit service by certified mail, return receipt requested.

Council member Shriner suggested that the Council consider whether there is a “middle ground” where service complies with due process, but is not as burdensome as personal service. Attorney Southwick suggested that such “middle ground” may not be relevant in criminal cases because witnesses tend to be either very friendly (no service required) or very hostile (personal service required). She also followed up on a previous question from the Council by reporting that a material witness warrant requires a supporting affidavit demonstrating probable cause to believe the witness will not appear.

Council member Shriner suggested that the Council send the project to the Evidence & Civil Procedure Committee to prepare a draft for Council consideration.

MOTION: Council member Pliskie moved, seconded by Council member Myers, to refer s. 885.03 back to the Evidence & Civil Procedure Committee to prepare a draft amendment for Council consideration. Motion approved with Council members Ziegler and Wanggaard abstaining.¹

VII. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that at today’s meeting, the committee will begin discussing the issues raised by the Council regarding the recommended amendments to ch. 809 and s. 885.42, record on appeal and the size and number of briefs in multiparty cases. The committee will also receive an update regarding pending appeals involving prisoner challenges to agency decisions. Attorney Southwick added that the committee is following three cases because the outcomes could impact the draft bill that was previously approved by the Council for introduction in the upcoming legislative session.

Committee chair Ptacek reported that the committee will discuss a potential new project that has been proposed by a circuit court judge. It has been suggested that circuit court judges should receive notice and right to intervene and object when parties agree to stipulate to a reversal on appeal.

The committee will continue discussing withdrawal and substitution of counsel at the appellate level. The committee previously studied rules from other states, and is ready to begin reviewing a draft rule. The committee will be revisiting s. 809.62, conditions of grant of review, in light of two new supreme court cases.

B. Criminal Procedure

Committee chair Blanchard reported that over the summer, the committee sent out a survey question to potentially interested stakeholders to inquiry whether they have experienced problems or have concerns or suggestions regarding the current discovery statute. At its September meeting, the committee discussed the responses it received. All of the responses

¹ Council member Ott was not present for the vote.

tended to focus on narrow issues. No responders suggested that the statute needs a major amendment.

The committee's next step is to attempt to determine the scope of the problems that were reported and which counties are using what is considered "best practices." Members will then try to assess whether education can be used to improve the practices in the counties that are considered problematic, or whether the "best practices" should be codified to raise discovery standards across the state and provide uniformity from county to county. The committee is also mindful that some counties have more resources available to employ better practices, so the committee will be considering the potential impact of its recommendations on counties of varying sizes.

Council member Ptacek stated that from the judicial perspective, he wants cases to move as quickly as possible to reach resolution. In his experience, early disclosure of police reports helps to move the case along. In contrast, when the prosecutor refuses to disclose any information until they are absolutely required to do so, the case tends to move more slowly. He suggested that discovery practices tend to reflect the prosecutor's basic philosophy regarding how to prosecute a case, and he questioned whether training would be effective at altering those practices.

Chair Bertz asked Council member Wanggaard about the status of the criminal procedure bill. Council member Wanggaard stated that he will continue to work with the Department of Justice and the Public Defender's office to identify areas of agreement to be included in the bill that will be introduced in the upcoming session.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee circulated a draft class action statute for feedback from potentially interested parties. The draft is modeled on the federal class action rule. Members will discuss the comments at the meeting later in the day. None of the feedback was in opposition to the proposed rule, although one organization suggested that class certification or denial should be appealable as a matter of right.

VIII. Other Business

A. PPAC Liaison's Report

There was no PPAC report.

B. Council Attorney's Report

Attorney Southwick reported that all three of the Council's standing committees met over the summer. She commended them for their hard work and dedication.

IX. Adjournment

The Council adjourned by consensus at approximately 11:05 a.m.