

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
October 18, 2013

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, George Burnett, Senator Glenn Grothman, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, Greg M. Weber, Honorable Maxine A. White, Amy E. Wochos.

**MEMBERS EXCUSED:** William Gleisner, Tracy K. Kuczenski, Benjamin J. Pliskie, A. John Voelker, Honorable Jeffrey A. Wagner, Honorable Mary K. Wagner.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Sandy Lonergan and Cale Battles, Wisconsin State Bar; Adam Gibbs, Sen. Grothman's office; Devon Lee, State Public Defender; Nancy Rottier, Director of State Courts.

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

Chair Bertz called the meeting to order at 9:40 a.m. New member George Burnett was introduced.

**II. Approval of September 20, 2013 Minutes**

**MOTION:** Council member Myers moved, seconded by Council member Stephens, to approve the September 20, 2013 meeting minutes. Attorney Southwick noted a typographical error on page 2. Motion approved unanimously with the noted correction.

**III. Discussion and/or Action Regarding Committee Recommendation Concerning Identification of Crime Victims in Appellate Briefs and Opinions**

Prior to the meeting, Attorney Southwick distributed a written memorandum from the Appellate Procedure Committee seeking Council approval of a rule prohibiting the use of a crime victim's name in appellate briefs and opinions in certain types of cases.

Committee Chair Blanchard explained that the proposed rule only applies to appellate briefs and opinions. The rule targets these two types of documents because they are available on the Internet. This is not a rule requiring confidentiality or the sealing of court records and it does not affect any documents or records at the trial level. It also does not apply to civil appeals. The committee considered narrowing the rule to apply to victims of "sensitive crimes," but concluded that it was too difficult to define "sensitive crimes." The proposed rule does not require redacting information and it does not extend to appendices because they are not available on the

Internet. Sub. (4) allows the parties to seek relief from the rule and allows others to seek protection under the rule. Committee Chair Blanchard also summarized the committee's considerations with regard to sub. (3), and the various drafting alternatives that the committee considered.

Council member Roggensack asked why the rule excludes homicide victims. Committee Chair Blanchard explained that one of the purposes of the rule is to ensure that crime victims are treated with sensitivity and respect for their privacy. The same privacy concerns are not present when the victim is no longer living. Additionally, committee members agreed that in cases of homicide, it is respectful to refer to the victim by name.

Council member Schimel asked why the rule does not specifically permit the use of pseudonyms. He questioned why the use of pseudonyms is explained only in the note. He provided an example of a case in which it was very problematic to use the victim's initials in a brief. He suggested that it should be clear to practitioners that other options are acceptable. Attorney Southwick stated that the committee reviewed a number of versions of this section of the rule and had a difficult time reaching consensus on the language. She recalled that one version specifically authorized the use of pseudonyms.

Council member Stephens reported that the State Public Defender's office opposes the rule because it fails to address the use of nicknames and it does not provide identity protection for child witnesses. She noted that nicknames may or may not be respectful. She also provided an example in which a nickname could be relevant to the case. She opposed a rule in which practitioners are not provided clear guidance and may be subject to sanctions or uncertainty about whether they need to seek an order pursuant to sub. (4) of the rule. She added that a rule requiring the use of first name and last initial would be preferable and would maintain consistency with other confidentiality rules.

MOTION: Council member Shriner moved, seconded by Council member Stephens, to amend the recommended rule to add the phrase, "or other appropriate pseudonym" to the end of sub. (3). Motion approved with Council members Ott and Roggensack abstaining.

Council member Burnett asked whether this rule extends a protection of confidentiality to people who are identified publically in lower court proceedings. Committee Chair Blanchard explained that this is not a rule of confidentiality, and it only applies to appellate briefs and opinions. It is not applicable to the circuit courts. Additionally, the rule was narrowly drafted to apply to documents available on the Internet. It does not apply to other documents that may be available to the public in the clerk's office. Council member Burnett suggested that protecting the identity of crime victims is a dramatic change from the way American courts have operated historically. He suggested that if identifying crime victims in court proceedings is a problem, the problem should be identified by the Legislature, not the Council.

Council member Schultz asked whether the rule is broad enough to cover the identity of victims identified in other counts that may have been dismissed or read in. Committee Chair Blanchard and Council member Stephens responded in the affirmative because the definition of victim includes "alleged" victim. Council member Schultz inquired about whether it would

apply when there are two separate cases moving forward involving two defendants and a number of victims. Committee Chair Blanchard stated that the committee did not discuss that type of scenario.

Council member Schultz asked why sub. (1) (a) uses the term "proceeding," while the other provisions in sub. (1) use the term "case." The committee chose the term deliberately because that stage is quasi-civil. Council member Stephens also noted that although it is a stage of an on-going case covered by pars. (b)-(d), s. 971.17 is mentioned separately in another section of the Rules of Appellate Procedure so she supported a specific reference to it in this provision to maintain consistency and clarity.

**MOTION:** Council member Schimel moved, seconded by Council member Wochos, to accept the recommendation from the Appellate Procedure Committee, as amended. Motion approved with Council members Stephens and Burnett opposed, and Council members Ott and Roggensack abstaining.

#### **IV. Discussion/Action Regarding Review of Wisconsin Rules of Evidence**

Prior to the meeting, Attorney Southwick distributed a written memorandum from the Evidence & Civil Procedure Committee seeking Council authorization to prepare a supreme court rule change petition seeking amendments to a number of evidentiary rules. All the proposed amendments were previously approved by the Council. The committee also noted that it is currently studying s. 885.205, privilege for communications between a student and dean of students or school psychologist. If the Council approves an amendment to s. 885.205, the committee recommended that it should be included in the petition. The committee recommended that the Council address possible amendments regarding expert witness privilege and spoliation/preservation as separate items.

**MOTION:** Council member Stephens moved, seconded by Council member Ptacek, to approve the recommendation from the Evidence & Civil Procedure Committee. Motion approved with Council member Weber opposed, and Council members Ott and Roggensack abstaining.

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

Attorney Southwick reported that the Assembly Judiciary Committee held a public informational hearing on 2013 Assembly Bill 383 on September 26, 2013. Several members of the Senate Judiciary Committee attended the hearing, as well as a designee from the State Public Defender's office and the Department of Justice. Council member Schultz presented the history of the bill and provided an excellent summary of its contents. Legislators had a few questions, many of which focused on the impact the bill may have on crime victims.

Council member Schultz added that the designee from the Department of Justice inquired about the nature of the support for the bill and implied that the degree of support was overstated. Council member Schultz clarified to the Council that he simply portrayed the history of the bill

and the fact that the bill was approved by the full Council without significant disagreement. He also explained that he was asked about ss. 975.001-975.08. These provisions allowed, prior to 1980, commitment to the Department of Health Services (DHS) if the crime was sexually motivated.

The designee from the Department of Justice suggested that the bill's repeal of ss. 975.001-975.08 would result in the release of those persons still committed. Council member Schultz stated that there are four individuals remaining committed to DHS under those provisions. He expressed an opinion that repealing the statutes would not impact the validity of those commitments. He compared it to the repeal of the former first-degree murder statute. It was repealed approximately twenty years ago; however, the statute's repeal did not result in the release of those convicted under it. Council member Schultz clarified that he misspoke at the hearing when he suggested that ss. 975.001-975.08 had already been repealed. The provisions are still in the code, but would be repealed by AB 383. Council member Schultz noted that if the repeal of those sections causes serious objections to the bill, those provisions could be retained in chapter 975.

Attorney Southwick reported that a second public hearing on AB 383 was held on October 11, 2013 at Marquette University Law School. Kelli Thompson and Marla Stephens provided written testimony and appeared in support of the bill on behalf of the State Public Defender's (SPD) office. They did an excellent job of expressing that although all public defenders do not agree with everything that is in the bill, the agency recognizes that the bill is a compromise document. It was drafted by a wide variety of representatives from the criminal justice system, including an SPD designee, and the SPD is standing behind that work. Council member Stephens did an excellent job of responding to questions from the judiciary committee.

Brookfield Assistant Chief Dean Collins appeared, although his testimony was not directed at AB 383. He testified regarding a void in current law that results in law enforcement lacking authority to enforce state forfeiture statutes. He suggested that a previously-introduced bill to correct the issue could be rolled into AB 383. Several legislators agreed to revisit the previously introduced bill. Assistant Chief Collins was asked whether his department tracks the costs associated with officers attending preliminary hearings. He explained that his department does not specifically track those costs. He added that in any police department, officers either appear in court while on overtime or they have been pulled off the street to go to court.

Nancy Rottier appeared on behalf of the Legislative Committee of the Judicial Conference in support of the bill. Although the committee is in favor of the bill, Attorney Rottier asked the Judiciary Committee to amend the bill to delay the effective date by six to twelve months to allow time for CCAP programming, and training for judges and lawyers on the new procedures in the bill.

While no one from the Department of Justice (DOJ) appeared at the hearing, a letter was distributed to the judiciary committee opposing the bill. To date, this is the only opposition that has been expressed. Attorney Southwick distributed copies of the letter to council members. Council member Ott suggested that since many points raised by DOJ are actually questions, perhaps the Council could begin by responding to those questions. He intends to schedule at least

one more public hearing on the bill. DOJ has indicated that it will designate someone to testify at that hearing. If the Council answers the questions raised in the letter prior to the next hearing, the remaining objections can be dealt with more efficiently.

Attorney Southwick called members' attention to the first paragraph on page two of the letter where DOJ alleges that the only reason given at the hearing for passing the bill is that, "We worked for a long time on this, trust our judgment, and pass 372 pages of reform so you don't have to do the hard work we did." She clarified that this was not the reason given at the September 26, 2013 hearing, and it is a gross misstatement and mischaracterization of the oral and written testimony given by Council member Schultz. Council member Schultz confirmed the inaccuracy of the quote. Council member Schultz added that the quote contained in the next paragraph of the letter is also inaccurate. He noted that while DOJ is certainly entitled to express its position, DOJ was represented by its designee on the Council when the Council agreed that there was a need for comprehensive reform more than two decades ago. Until the receipt of this letter, no one has disputed the need for comprehensive reform of the criminal procedure code.

With regard to the questions raised by DOJ, Council member Schultz agreed with Council member Ott's suggestion that the Council should address those issues at the next hearing and he offered his assistance in preparing responses.

Council member Roggensack inquired whether it would be helpful for the criminal procedure committee to prioritize the changes contained in the bill. If the Legislature has some concerns about passing the bill in its entirety, perhaps they could pick out the portions that are considered the most important. Members generally agreed that because the bill is a compromise document, prioritizing changes would probably require the committee to start over with the drafting process.

Members of the Criminal Procedure Committee will begin working on responses to the questions raised by DOJ. Council member Ott suggested that the Assembly Judiciary Committee could delay its next public hearing until late January to give the Council time to prepare its responses.

## **VI. Discussion/Action Regarding Presentence Investigation Report Bill**

Council member Grothman reported that his office is considering a bill that would allow the crime victim to obtain a copy of the presentence investigation report. He asked the Council to consider the issue and offer feedback. He raised concerns about geographical areas where gangs are prevalent because releasing the information could endanger the people who provided information for the report.

Council member Schimel stated that the issue was discussed recently at the Wisconsin District Attorneys (WDAA) meeting. District attorneys had concerns about allowing the victim to have a copy of the presentence investigation report, but suggested that perhaps district attorneys should be permitted to discuss aspects of the report with the victim.

Council member Shriner noted that in the United States, victims are not a party in the criminal prosecution. Providing a copy of the report to the victims essentially treats them like a party.

Council member White suggested that there could be a cost factor involved. Each time an additional person is given an opportunity to review the report, it potentially delays the sentencing hearing. This is because the additional party is likely to raise objections or complain of inaccuracies and the court will have to resolve it. It costs money to keep the defendant in jail waiting for sentencing.

Council member Stephens noted that the presentence investigation reports are currently confidential. Many people are asked to provide information as part of the investigation. They may be reluctant to do so if the report is not confidential. Additionally, the reports also contain information that may be confidential by other law, such as medical information. Council member Stephens offered to look at the proposal and provide feedback on behalf of the State Public Defender's office. She suggested that the Department of Corrections might be able to identify other considerations regarding confidentiality.

Council member Grothman will send a copy of the draft bill to Attorney Southwick. Attorney Southwick will distribute it to the Council and place it on the next agenda for discussion by both the Council and the Appellate Procedure Committee.

## **VII. Discussion and/or Action Regarding 2013 SB 153**

Council member Grothman explained that Senate Bill 153 allows Wisconsin courts to issue restraining orders against individuals who reside in jurisdictions outside of Wisconsin if the victim is a Wisconsin resident or is temporarily living in Wisconsin. Council member Grothman expressed concern that a restraining order could be issued against someone from another state who may not have sufficient opportunity to appear in a Wisconsin court to oppose it. He also expressed concern that this provision could be subject to abuse. He asked the Judicial Council to study the bill and provide comment.

Council member Shriner expressed concern that the bill may not satisfy due process because it extends the exercise of personal jurisdiction to a person who has had no minimum contacts with Wisconsin. Members generally agreed that if the victim received threats in Wisconsin, then the courts have jurisdiction, but if all the abusive acts occurred in another state, Wisconsin courts do not have jurisdiction.

Council member Stephens expressed concern that a restraining order issued under this bill could give the victim a false sense of security because a Wisconsin district attorney probably would not be able to prosecute someone in another state who violates the order. She also questioned what Wisconsin law enforcement can do to enforce this type of order. She stated that the State Public Defender's office intends to file written comments on the bill.

Attorney Southwick explained that the Council has historically agreed to study bills and offer comments on procedural and constitutional issues, but the Council has avoided offering

comments on matters of public policy. Council member Stephens spoke in support of the Council studying this issue further because it involves procedural questions such as due process. This is the type of issue for which the Council is statutorily tasked with providing guidance to the Legislature. Council member Grothman suggested that it would be helpful if the Council could offer comments on the bill by January 2014.

**MOTION:** Council member Burnett moved, seconded by Council member Myers, that the Council notify the Legislature of its intent to study 2013 Senate Bill 153 and its companion, 2013 Assembly Bill 171, and offer comments on legal and constitutional issues, but not public policy considerations.

Attorney Southwick stated that the Council can ask a standing committee to study the issue or the full Council can undertake a study. Historically, a review of proposed legislation has been undertaken by the full Council. Attorney Southwick stated that she could compile an introductory research memorandum and the Council could begin discussing the legal issues at its November meeting. She noted that the Council does not meet in December, so it may not be able to complete a study and act on this issue until the January meeting.

The Council asked Attorney Southwick to send a letter to the chair of the Assembly committee advising that the Council has agreed to study the bill. Council member Roggensack requested that the Council approve the letter. After discussing various alternative drafts, members agreed by consensus that the letter should simply state, "At its October 18, 2013 meeting, the Wisconsin Judicial Council reviewed Assembly Bill 171/Senate Bill 153, and is willing to place the bill on the Council's agenda for further discussion and study."

Council member Stephens requested that Attorney Southwick prepare a research memo for Council consideration at the next meeting. Council member Weber requested that Council member Grothman provide Attorney Southwick with written testimony received by legislative committees regarding the bill so that she can circulate it to Council members along with the research memo.

**MOTION:** Council member Burnett amended his previous motion and moved, seconded by Council member White, that the Council send a letter to the chair of the committee assigned AB 171/SB 153 consistent with the language previously agreed upon by the Council. Motion approved with Council members Roggensack and Ott abstaining.

## **VIII. Committee Reports**

### **A. Appellate Procedure**

The committee report was postponed until the next meeting.

### **B. Criminal Procedure**

The committee report was postponed until the next meeting.

**C. Evidence and Civil Procedure**

The committee report was postponed until the next meeting.

**IX. Other Business**

**A. PPAC Liaison's Report**

There was no PPAC report.

**B. Council Attorney's Report**

There was no attorney's report.

**X. Adjournment**

The Council adjourned at 11:55 a.m.