

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
December 12, 2014

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, Hon. Michael Fitzpatrick, William Gleisner, Jill Kastner, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Honorable Robert P. Van De Hey, Greg M. Weber.

MEMBERS EXCUSED: Senator Glenn Grothman, Tracy K. Kuczenski, Devon Lee, Brad Schimel, Thomas L. Shriner, Honorable Jeffrey A. Wagner, Amy E. Wochos, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Anna Henning, Legislative Council; Sandy Lonergan, Wisconsin State Bar; Nancy Rottier, Director of State Court's office.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m. and members introduced themselves.

II. Approval of October 17, 2014 Minutes

MOTION: Council member Myers moved, seconded by Council member Kastner, to approve the October 17, 2014 minutes. Motion approved unanimously.

III. Discussion and/or Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure

The Judicial Council continued to work on amendments to 2013 Assembly Bill 383 to prepare for reintroduction in 2015. Vice Chair Blanchard reported that the Criminal Procedure Committee has been reviewing the bill drafts prepared by the Legislative Reference Bureau (LRB) and containing the amendments previously approved by the Council. The LRB has deviated from the Council's drafting requests in several areas, but the committee has been monitoring the changes and following up with requests for further changes.

Attorney Southwick reported that since the last Council meeting, the Criminal Procedure Committee reviewed two rounds of amendments from the LRB. The first draft contained a number of changes that deviated from the Council's drafting request. The committee submitted additional drafting requests to bring the draft in line with the amendments approved by the Council. The LRB recently completed a second draft of the bill containing the amendments. The committee reviewed those amendments earlier in the week. The committee requested a few additional changes, but they were not substantive.

Attorney Southwick explained that some additional proof reading will probably be needed because when the Council approved restoration of current law regarding preliminary examinations, references to the information and arraignment also had to be restored. She also noted that prior to reintroduction, the LRB drafter will need to update the bill analysis. However, she expressed optimism that the bill will be ready for introduction in January. She noted that LRB has been very prompt in completing the Council's redrafting requests.

Council member Weber observed that some of the redrafting requests are due to the LRB attorney's attempts to make the Council's requested language consistent with the LRB's drafting manual. He suggested that the Council request a copy of the drafting manual. Attorney Southwick indicated that she has previously requested it, and she will make another attempt to obtain it.

IV. Discussion and/or Action Regarding Proposed Bill Regarding Transfer of Structured Settlement Payments

Attorney Southwick provided some background information on the issue of the transfer of structured settlement payments. Wisconsin is one of only two states without laws to regulate such transfers. The Judicial Council initially began studying the issue, but determined that a number of policy decisions would be required to draft a proposed bill. The Council felt that policy decisions are best left to the Legislature, so at Council member Ott's suggestion, Attorney Southwick wrote a letter asking the Joint Legislative Council to appoint a study committee to draft legislation. The project was accepted, and the committee recently completed its work.

Council member Ott reported that the study committee has unanimously approved a bill draft regulating the transfer of structured settlement payments in Wisconsin. Attorney Southwick circulated a copy of the draft to members prior to the meeting. Council member Ott explained that, among other provisions, the bill contains a prohibition on transferring Medicaid payments.

Legislative Council Attorney Anna Henning was present to answer questions. She explained that the Joint Legislative Council will likely meet in January 2015 to consider the proposed bill and vote on whether to introduce it in the Legislature. If it is introduced, it will then move through the regular legislative process. Council member Weber requested that the Wisconsin Department of Justice be given the opportunity to provide comments, if the bill is introduced.

Council member Fitzpatrick, who served on the Legislative Council study committee, spoke in support of the draft bill. In his opinion, the proposed bill would provide circuit court judges with useful procedures and helpful guidance regarding when it is appropriate to approve a transfer of structured settlement payments.

MOTION: Council member Ptacek moved, seconded by Council member Gleisner, that the Judicial Council support the bill drafted by the Legislative Council Study Committee on

Transfer of Structured Settlement Payments. Motion approved with Council members Ott and Weber abstaining.

V. Discussion and/or Action Regarding the Uniform Electronic Recordation of Custodial Interrogations Act

Attorney Southwick reported that the Wisconsin Uniform Law Commissioners asked the Judicial Council to study the Uniform Electronic Recordation of Custodial Interrogations Act and make a recommendation regarding whether it should be adopted in Wisconsin. The Judicial Council referred the project to its Criminal Procedure Committee. The committee studied the provisions in the Uniform Act and compared it to current Wisconsin law, including Wis. Stats. §§ 938.195, 968.073, and 972.115. The committee also consulted representatives from several organizations, including the Department of Justice, the State Public Defender's office, the Wisconsin District Attorneys' Association and the Wisconsin Association of Criminal Defense Lawyers, to inquire about any concerns or issues with current law or conflicting court of appeals decisions surrounding recording custodial interrogations. Ultimately, no problems were identified with current law, and the committee did not find the provisions in the Uniform Act to be an improvement over current law, so adoption is not recommended.

The Council accepted the committee's recommendation with minimal discussion.

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

Prior to the meeting, Attorney Southwick circulated a memo containing the project history and a status update. She also circulated a preliminary draft rule change petition containing the proposed amendments, as well as bill drafts repealing the Man's Statute, Wis. Stat. § 885.16, and Privileged Communications, Wis. Stat. § 885.205. She explained that the Council's study of the rules of evidence was initially suggested by Marquette University Professor Daniel Blinka. Over the past several years, the Council's Evidence & Civil Procedure Committee has undertaken the first comprehensive review of Wisconsin's evidence rules since their adoption in the 1970's. The drafts contain the changes recommended by the committee and previously approved by the Judicial Council.

Attorney Southwick asked the Council to consider two issues: (1) whether to solicit written comments on the proposed amendments and/or whether to hold a public hearing; and (2) which rules should be amended by the supreme court and which rules should be amended by legislative action.

Council member Gleisner spoke in support of seeking public comments. He also supported seeking amendments via a supreme court rule change petition. Council member Fitzpatrick recalled that the supreme court may have attempted to repeal the Deadman's Statute several decades ago, but the Legislature intervened to retain it. Attorney Southwick stated that her recommendation is to seek repeal of the two statutes in chapter 885 through legislative action because those provisions were created by the Legislature. She recommended that the remainder of the proposed changes be presented to the supreme court for amendment.

Council member Fitzpatrick noted that the supreme court will seek public comment and conduct a public hearing on any proposed changes to the evidence rule, so he questioned why the Council would also engage in the same process. Attorney Southwick explained that historically the Council and its drafting committees use the public feedback to review and possibly improve the Council's proposed amendments prior to filing a rule change petition or introducing a bill. Also, if the Council can work with interested stakeholders to answer questions and alleviate their concerns or objections in advance of the supreme court or legislative public hearings, the Council's work has a much better chance for adoption. If the Council can involve interested groups earlier in the process, those groups are also much more likely to voice their support publically for the changes recommended by the Council.

Council member Ott reported that he discussed the proposed repeal of Wis. Stat. § 885.205 with an attorney for the Legislature's Law Revision Committee. He felt that the proposed repeal was a bit beyond the scope of the committee's work and it would be better to accomplish it through the regular legislative process. Prior to the meeting, Attorney Southwick circulated a letter from the Law Revision Committee regarding the scope of the committee's work. Based on the letter and Council member Ott's recommendation, she proposed that the repeal should be advanced by introducing a bill.

The Council agreed by consensus to seek feedback from potentially interested stakeholders regarding the Judicial Council's recommended changes to the rules of evidence. Council member Gleisner spoke in support of publishing the proposed changes in the Wisconsin Lawyer magazine to notify members of the bench and bar of the proposed changes. Attorney Southwick explained that due to the Council's very limited budget, there are no funds available to pay for print publication. However, the State Bar's electronic publications (Rotunda Report and Inside Track) may be willing to publish notices at no cost to the Council. Council member Gleisner stated that in his experience, the supreme court schedules hearings with only a few weeks notice and that is not sufficient time for interested parties to respond. The Council agreed to allow 90 days for interested parties to provide written comments on the proposed changes. After the holiday season, Attorney Southwick will circulate the requests for feedback to potentially interested groups, including the various sections of the State Bar and the Judicial Conference. She will also request that the State Bar publish notice of the proposed changes and the Council's request for feedback. Once the period for providing written comment has closed, the Council will review the responses and discuss whether to hold a public hearing.

After the feedback has been reviewed, the Council will take up the issue of whether to proceed with the amendments through supreme court action or legislative action.

VII. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to study the issue of prisoner challenges to agency decisions. The committee is working on a draft bill to reorganize the statutes into one subchapter to make it easier to locate the relevant law. Committee members Meredith Ross (former director of the Remington Center) and Matt Robles (former staff attorney

with the Dane County Circuit Court) have provided the committee with several very helpful memos containing their recommendations for reorganization of the current statutes and codification of case law.

The committee also continues to study Rule 809.15, including possible amendments to address audio and visual recordings in the appellate record.

B. Criminal Procedure

Committee chair Blanchard reported that the committee has primarily focused its work on the criminal procedure bill. The committee has also discussed whether to resume its study of procedural concerns related to police searches using GPS and other tracking technology.

In conjunction with approving several amendments to the criminal procedure bill, the Council also previously authorized the Criminal Procedure Committee to study and make recommendations in the following areas: preliminary hearings, discovery depositions, and search warrants and interception of electronic communications. The committee has suggested consulting with the new Attorney General regarding which issues or topics may be a priority to the Wisconsin Department of Justice.

C. Evidence and Civil Procedure

The committee's chair is traveling out of the country, so the committee will not meet this month. Attorney Southwick reported that the committee continues its work on Wisconsin's class action statute. Council member Fitzpatrick added that the committee is also studying the consumer protection provisions to ensure that the class action rules in both sections of the statutes are consistent.

VIII. Other Business

A. PPAC Liaison's Report

There was no PPAC report.

B. Council Attorney's Report

1. Supreme Court Rule Change Petition 13-16, Uniform Interstate Deposition and Discovery Act

The Council previously filed a supreme court rule change petition to repeal current Wis. Stat. § 887.24 and replace it with the Uniform Interstate Depositions and Discovery Act ("UIDDA"). The UIDDA is a model uniform law that allows out-of-state litigants to obtain third-party discovery in the enacting state. The supreme court held a public hearing on the proposed rule in September 2014.

Attorney Southwick reported that the court discussed the Council's petition in administrative conference December 5, 2014. The court expressed some minor concerns about a

few provisions in the proposed rule. The court referred the rule back to the Council's Evidence & Civil Procedure Committee for further discussion and possible amendment. The court indicated general support for the proposed rule once its concerns have been addressed.

2. Supreme Court Rule Change Petition 14-01, Identification of Crime Victims in Appellate Briefs and Opinions

The Council previously filed a supreme court rule change petition to create a rule to protect the identity of crime victims in appellate briefs and opinions. The supreme court held a public hearing on the proposed rule and discussed it in administrative conference in September 2014.

Attorney Southwick reported that on December 5, 2014, the court voted in administrative conference to adopt the proposed rule with some slight modifications. The court agreed to address judicial opinions and decisions through the court's internal operating procedure, instead of by rule. The court also opposed requiring parties to file a motion to be excused from compliance with the rule, and will likely modify the proposed rule to allow excusal for good cause without requiring a court order.

Council member Ott noted that a recent Ozaukee County appeal involved the use of a crime victim's name, and the district attorney filed a motion to protect the victim's identity. Attorney Southwick stated that the supreme court has also been notified of that case. Council member Weber stated that the Ozaukee County case demonstrates why it is important for the supreme court to adopt the proposed rule to protect crime victims.

IX. Adjournment

The Council adjourned at 10:45 a.m.