

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 20, 2013

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

MEMBERS PRESENT: Chair Thomas W. Bertz, William Gleisner, Tracy K. Kuczenski, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, A. John Voelker, Honorable Jeffrey A. Wagner, Honorable Maxine A. White, Amy E. Wochos.

MEMBERS EXCUSED: Vice Chair Honorable Brian W. Blanchard, George Burnett, Senator Glenn Grothman, Honorable Patience Roggensack, Marla J. Stephens, Honorable Mary K. Wagner, Greg M. Weber.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Adam Gibbs, Sen. Grothman's office.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:35 a.m.

II. Approval of June 21, 2013 Minutes

MOTION: Council member Myers moved, seconded by Council member J. Wagner, to approve the June 21, 2013 meeting minutes as submitted. Motion approved unanimously.

III. Discussion and/or Action Regarding Uniform Interstate Deposition and Discovery Act

Prior to the meeting, Attorney Southwick distributed a written memorandum from the Evidence & Civil Procedure Committee seeking Council approval of a modified version of the Uniform Interstate Deposition and Discovery Act for recommended adoption in Wisconsin. The Wisconsin Uniform Law Commissioners asked for a recommendation from the Judicial Council prior to their November meeting.

Committee Chair Shriner explained that adoption of the Uniform Act would modernize the practice of obtaining discoverable information from a Wisconsin resident for use in an out-of-state case. He explained how the process would work under the proposed rule. The Uniform Act allows a party to out-of-state civil litigation to submit a foreign subpoena to a Wisconsin clerk of the circuit court for the county in which discovery is sought. The appropriate Wisconsin subpoena form, conformed to the terms of the foreign subpoena, must also accompany it. The clerk shall review it, and sign and issue the subpoena. Alternatively, the rule still allows the out-of-state party to hire a Wisconsin lawyer to subpoena the Wisconsin resident. If the Wisconsin

resident raises issues such as burdensomeness or privilege, a Wisconsin court decides the issue under Wisconsin law. Committee Chair Shriner stated that the rule provides no fee for the subpoena, but a fee would be due if a special proceeding is filed to enforce or quash the subpoena. The committee consulted the Director of State Court's office on the issue of fees.

Council member Ptacek suggested that the court clerks might want to track subpoenas that they issue, and may open a file for these matters. Committee Chair Shriner stated that nothing in the rule would prohibit that, but the rule does not require it unless a special proceeding is filed to challenge or enforce the subpoena. One goal of the drafting committee was to minimize the burden on Wisconsin court clerks.

Council member Gleisner spoke in favor of the rule because it clarifies a number of issues that are not resolved under current law. For example, it makes the Wisconsin judge's decision appealable and it gives the circuit court authority to award fees and costs.

Attorney Southwick reported that approximately thirty states have already adopted the Uniform Act.

MOTION: Council member Shriner moved, seconded by Council member J. Wagner, to accept the recommendation from the Evidence & Civil Procedure Committee. Motion approved with Council member Ott abstaining.

Attorney Southwick asked members how they would like to proceed. She suggested that the Council can elect to do one of the following: 1) send the recommendation to the Uniform Law Commission; 2) pursue adoption of the proposal via supreme court rule change petition; or 3) work to introduce the proposed rule as a bill in the Legislature. Members agreed by consensus to pursue adoption of the proposal by supreme court rule change petition. Members directed Attorney Southwick to draft a petition and report to the Uniform Law Commission on the status of the project. Attorney Southwick explained that due to the demands of the criminal procedure bill, she will probably not be able to draft a rule change petition by the October Council meeting. However, she will make every effort to have a petition drafted for Council review at the November meeting.

IV. Discussion/Action Regarding Supreme Court Rule Petition 12-01, Judicial Rulemaking

The Council previously provided comments to the Wisconsin Supreme Court on this issue. Prior to the meeting, Attorney Southwick distributed a brief summary memo; a letter from Court Commissioner Julie Rich, dated June 21, 2013, seeking additional comment on petition 12-01; and an amendment to petition 12-01, dated August 2, 2013. Attorney Southwick noted that the court extended the deadline for comments to accommodate the Council's meeting schedule.

Former Council Chair Beth Hanan previously provided comments to the court. One particular issue she noted was that the period allowed for the petitioner to respond to comments should be sufficiently long to allow groups such as the Judicial Council to comply given the

monthly meeting schedule. Attorney Southwick noted that the current proposal allows sixty days for a response from the petitioner, so the Council should have sufficient time to meet and prepare a response. Additionally, the proposed rule allows the court to enlarge that time period. Historically, the court has been very gracious about working with the Council and its meeting schedule, so she does not anticipate that the proposed deadlines will cause any issues.

Attorney Southwick provided the Council with several examples of how long it has taken past Council petitions to become effective rules. She noted that the proposed rule in the latest petition could potentially make the adoption process much longer. If the Council would like a proposal heard more promptly, it could alternatively pursue adoption via a bill introduced in the legislature.

Members generally agreed that the court should choose its own work schedule.

MOTION: Council member Shriner moved, seconded by Council member Ptacek, to take no position and provide no further comment on Supreme Court Rule Petition 12-01. Motion approved unanimously.

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

Council member Schultz announced that the Legislative Reference Bureau has completed its analysis and the bill is in final form and ready for introduction. The workgroup met over the summer. The workgroup reviewed the final LRB drafting notes that were embedded in the draft, and corrected a few inadvertent errors and issues raised by the State Bar Criminal Law Section Board. Attorney Southwick has completed an amended redlined version of the amendments consistent with the final bill.

Council member Ott reported that an informational hearing has been scheduled for Thursday, September 26 at 1:00 p.m. At least one public hearing is likely to follow the informational hearing. Attorney Southwick will distribute hearing notices to council members.

Prior to the meeting, Attorney Southwick distributed a memo regarding a bill amendment suggested by the State Bar Criminal Law Section Board. Catherine Dorl, Trial Division Director, Office of the State Public Defender, provided additional written comments to support the request. Attorney Dorl stated that a handful of district attorneys require the defense attorney to come to the district attorney's office at very specific dates and times to review discoverable documents and make copies. She suggested that instead of requiring that documents be made available, the discovery rules should simply require that copies be provided to opposing counsel.

Council member Schultz agreed that it is a problem, but suggested that the Council is not the appropriate body to recommend a solution. He suggested that perhaps the issue can be addressed by the Legislature. Council member Schimel stated that there is a statutory cap on the copy costs that can be passed on to the public defender. In some counties, the cap is lower than the actual cost so it actually costs the district attorney's office money to make the copies.

Council members noted that the current procedures vary widely from county to county. Members questioned the need to adopt a statute to dictate how every county must conduct discovery simply because a few counties may not act professionally. Judicial members suggested that if a prosecutor in a particular county is being unreasonable, the defense attorney should ask the judge to resolve it.

Members took no action on the issue of providing copies of discoverable material.

VI. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that the committee met earlier in the month and approved a rule for identifying crime victims in appellate briefs and opinions. The committee's recommendation will be forwarded to the full Council for discussion at the October meeting. The rule discussion was delayed until October because the committee chair and a number of members were absent from the Council's September meeting due to their attendance at an appellate seminar.

The committee will begin a new project at its October meeting: prisoner challenges to agency decisions. These actions are usually handled *pro se* so it has been difficult to locate *ad hoc* committee members with specialized knowledge in this area. The committee's goal is to improve efficiency by reorganizing current statutes to make them easier to locate, and codifying settled case law so that *pro se* parties have an easier time finding and understanding it.

B. Criminal Procedure

Attorney Southwick reported that the committee met earlier in the month and continues to study procedural concerns related to police searches using GPS and other technology. The committee has discovered that the use of cellular technology for tracking is also becoming an issue for the courts. The Wisconsin Supreme Court currently has two pending cases involving warrantless tracking via cellular phone.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the committee continues to study *Alt v. Cline*, 224 Wis.2d 72, and whether to recommend codification of an expert privilege. The committee is also studying an amendment to Wisconsin's class action rule to bring it in line with its federal counterpart. The committee has not yet begun its most recent project regarding the requirements for service of a subpoena, and attempting to achieve some consistency throughout the Wisconsin notice statutes.

VIII. Other Business

A. PPAC Liaison's Report

Council member Voelker reported that PPAC has approved proposed rules regarding limited scope representation. A new subcommittee will study mediation and limited scope representation because that issue remains unresolved under the new rules.

B. Council Attorney's Report

Attorney Southwick reported that she and Bill Gleisner worked with Judge Leineweber and Judge Sankovitz to present a webcast CLE for the State Bar on the new rules drafted by the Council regarding inadvertent disclosure of privileged information.

Both the State Bar and the Third Branch have asked Attorney Southwick to write articles on the Judicial Council's criminal procedure bill.

IX. Adjournment

Members introduced themselves and welcomed new Council member Amy Wochos.

The Council adjourned at 10:35 a.m.