

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 15, 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, William Gleisner, Senator Glenn Grothman, Tracy K. Kuczenski, Dennis Myers, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Greg M. Weber, Amy E. Wochos.

MEMBERS EXCUSED: Representative Jim Ott, Honorable Patience Roggensack, Brad Schimel, Honorable Jeffrey A. Wagner, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Adam Gibbs and Rachel VerVelde, Sen. Grothman's office; Devon Lee, State Public Defender's office.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:40 a.m.

II. Approval of October 18, 2013 Minutes

MOTION: Council member Myers moved, seconded by Council member Blanchard, to approve the October 18, 2013 meeting minutes as submitted. Motion approved unanimously.

III. Discussion and/or Action Regarding Uniform Interstate Depositions and Discovery Act Rule Change Petition

Prior to the meeting, Attorney Southwick distributed a draft supreme court rule change petition and supporting memorandum proposing the adoption of a slightly modified version of the Uniform Interstate Depositions and Discovery Act that was approved previously by the Council.

Council member Burnett asked whether the Council considered including a fee for the subpoena. Council member Shriner responded that the drafting committee considered the issue of fees. He explained that there is no fee charged currently. The committee consulted the director of state courts office and no change was requested. Under the proposed rule, there will be no fee unless some action is required by the court to enforce, modify or quash the subpoena.

Council member Kuczenski inquired about an incorrect cross-reference contained in the Uniform Comment on page three of the petition. Attorney Southwick noted that the petition contains an exact quote from the original Uniform Comment. She will edit the petition to indicate that the error is contained in the original work that is cited.

The Council agreed by consensus to file the petition and supporting memorandum.

IV. Discussion/Action Regarding 2013 Assembly Bill 383 Amending the Rules of Criminal Procedure

Attorney Southwick reported that a crime victim advocacy group filed comments with the judiciary committees regarding the criminal procedure bill. She distributed copies of the comments to Council members. Council member Schultz stated that the concerns expressed by the victim's group are not new. These issues have already been discussed with the group, and a few are also shared by the Department of Justice.

Professor Schultz and Attorney Southwick are preparing a response to the comments previously submitted by the Department of Justice. Attorney Southwick proposed that the Council appoint a workgroup to assist with a response on behalf of the Council. She noted that the full Council does not meet again until January 17, 2014. Rep. Ott previously indicated that the judiciary committees would like to hold another hearing in January, so it would be helpful to submit the Council's response to DOJ's concern in December.

Council member Schultz noted that DOJ has questioned the general need for a comprehensive amendment to the code and has questioned whether current Council members continue to support the bill. Council member Shriner acknowledged that the Council's membership has changed considerably over the course of this project. However, the full Council conducted a recent review and amendment to the proposal, and at that time, members voiced their continued support for the bill. He suggested that it is no longer appropriate for the Council to continue to revisit issues that have already been decided because the bill has been introduced. Now it is in the hands of the Legislature, not the Council. Council member Gleisner agreed, and suggested that the Council cannot continue to revisit the same issues. The decisions have been made and consensus has been reached. It is now up to the Legislature to decide what to do with the recommendations that have been made by the Council. Attorney Southwick clarified that the Council does not need to revisit its previous recommendations. However, Representative Ott has indicated that the Council's response to the questions and concerns that have been raised by DOJ are very important to the Legislature's continued discussion of the bill.

MOTION: Council member Wochos moved, seconded by Council member Ptacek, to express the Council's continued support for the bill and to authorize a workgroup (consisting of Council members Schultz, Stephens, Schimel, and Ptacek and staffed by Attorney Southwick) to respond to the questions and concerns raised by DOJ. The workgroup was given authority to explain the portions of the bill where questions have arisen and to defend the Council's position, but was not given authority to recommend any modifications to the bill. If the workgroup determines that any amendment is appropriate, the matter must be brought to the full Council for discussion prior to any action being taken. Motion approved with Council member Weber abstaining.

Council member Schultz reported on the status of the response to DOJ. DOJ inquired as to whether the Council "checked with" a number of different agencies and organizations. Attorney

Southwick has followed up with victim's groups and law enforcement. Council member Schultz advocated going a step further by drafting responses that assume there are substantive concerns underlying those questions. He noted that in a number of situations, the bill does not change current law in the manner that the DOJ comments suggest. In other cases, he reviewed Council drafting records that provide reasons for the recommended changes, including protecting victims. He has found it very helpful to go back and review why the Council took certain positions.

V. Discussion/Action Regarding Presentence Investigation Report Bill

At the previous meeting, Council member Grothman reported that his office is considering a bill that would allow a crime victim to obtain a copy of the presentence investigation (PSI) report. He asked the Council to consider the issue and offer feedback. Prior to the meeting, Attorney Southwick distributed a draft of the proposed change. It would allow the district attorney to disclose certain portions of the PSI report to the victim, including the sentencing recommendation and victim information.

Council member Kuczenski suggested that the second sentence of the proposed amendment could be read to give the victim greater access than intended because it says, "...victim who views the contents of a presentence investigation report..." She proposed that the issue of confidentiality should be addressed in two separate sentences, with one sentence applicable to the defendant and a separate sentence applicable to victims.

Rachel VerVelde from Senator Grothman's office updated the Council on the proposal to give victim's limited access to information in the PSI report. Attorney Southwick noted that the Appellate Procedure Committee will also be discussing the proposal at its meeting following the full Council meeting.

VI. Discussion and/or Action Regarding 2013 SB 153/2013 AB 171

Council member Grothman previously requested that the Council study 2013 Senate Bill 153, which is intended to clarify when a court has subject matter and personal jurisdiction in certain actions for restraining orders or injunctions in cases of domestic abuse, child abuse, or harassment. Attorney Southwick reported that the Senate Committee on Transportation, Public Safety, and Veterans and Military Affairs approved an amendment to the bill on November 6, 2013. The amendment eliminates the phrase, "...the abuse or harassment alleged in the action could have an effect in Wisconsin or..." It also adds a provision to permit the respondent to participate in court hearings via telephone or audiovisual means. The Assembly Committee on Criminal Justice held a public hearing on the companion bill (AB 171) on November 7, 2013.

Prior to the Council meeting, Attorney Southwick distributed a brief introductory memo and three relevant law review articles discussing constitutional and other concerns relevant to this type of legislation. She also circulated copies of the written testimony received by the legislative committees at the public hearings.

Council member Burnett suggested that the bill should be further amended to read, "if the petitioner or alleged child victim resides or is living temporarily in Wisconsin, and if jurisdiction

is otherwise permissible under the constitution of the United States and of the state of Wisconsin." Council member Shriner agreed that this additional amendment would address the due process concerns that the Council previously discussed. Members also discussed the practical considerations surrounding enforcing restraining orders and injunctions across state lines.

Adam Gibbs indicated that Senator Grothman has some concerns with the provision that allows the respondent to appear by telephone or video conference. For example, he questioned whether the courts are likely to give testimony the same weight when it is given by telephone, compared to testimony from a party who is physically present in the courtroom. The Council generally discussed presence, when it is required, and when it can be waived.

The Council discussed whether further consideration of the bill is needed and generally agreed that its concerns would be resolved by the amendment suggested by Council member Burnett. Adam Gibbs will relay the proposed amendment to Senator Grothman.

VII. Committee Reports

A. Appellate Procedure

Committee chair Blanchard reported that the committee is working on issue of prisoner challenges to agency decisions. The committee will attempt to address the problem that rules are currently scattered throughout the statutes and case law, making them difficult to find and apply. The committee is looking at consolidating the rules into one subchapter of the code. The committee has asked the Legislative Reference Bureau (LRB) to draft a bill to reorganize the current rules. The second step will involve studying relevant case law to codify holdings and insert those rules into the code. The final step will involve reviewing the reorganized rules and codification to determine whether amendments are needed to insure consistency and clarity.

The LRB drafter has indicated that once the current legislative floor period is closed, she will have some time to devote to drafting the bill. The committee hopes to have a draft to review by its January meeting.

B. Criminal Procedure

Committee chair Stephens reported that the committee did not meet in November. Members are currently working on their respective research assignments regarding the GPS project. The work assignments are due November 25th and the committee will meet December 4, 2013 to discuss the research.

C. Evidence and Civil Procedure

Committee chair Shriner reported that at today's meeting, the committee will resume studying Wis. Stat. § 885.205 regarding privileged communications between students and deans and school psychologists. While s. 885.205 creates a privilege of sorts, it is not located in

chapter 905 with the other evidentiary privileges. In addition, its structure is not consistent with other privilege rules.

The committee also continues to discuss the expert privilege created in *Alt v. Cline*, 224 Wis.2d 72. The committee is considering whether a rule should be codified. The committee is particularly concerned about physicians claiming a privilege when they are called to testify as fact witnesses. Council member Weber offered to obtain information from assistant attorneys general and district attorneys regarding physicians who are called to testify as fact witnesses but demand expert witness fees. Committee member Leineweber is currently writing for the State Bar on the issue of medical malpractice. In the course of his research, he will be interviewing medical malpractice attorneys and he has agreed to inquire about their actual practice experience regarding the expert privilege.

The committee will also continue to study the issue of spoliation and preservation of evidence and whether a rule should be recommended to address it. Guidance is currently found only in case law. The federal rules committee is also studying the issue and recently released a proposed rule draft.

VIII. Other Business

A. PPAC Liaison's Report

Council member Voelker reported that PPAC continues to work on drug court standards and programs related to evidence-based standards.

B. Council Attorney's Report

Attorney Southwick reported that the Judicial Conference met the previous week, but she was unable to attend due to the location. She submitted a written report from the Council, and Council member White was present to respond to questions. Council member Ptacek reported that the Judicial Conference elected Judge Fitzpatrick, Rock County Circuit Court, to replace Judge Mary Wagner, whose term on the Council had expired. Council member Ptacek was reappointed to his second term on the Council.

IX. Adjournment

The Council adjourned at 10:50 a.m.