MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 17, 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, Honorable Michael R. Fitzpatrick, William Gleisner, Devon Lee, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, A. John Voelker, Honorable Jeffrey A. Wagner, Greg M. Weber, Honorable Maxine A. White, Amy E. Wochos.

MEMBERS EXCUSED: George Burnett, Senator Glenn Grothman, Tracy K. Kuczenski.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Adam Gibbs and Rachel VerVelde, Sen. Grothman's office; Sandy Lonergan, Wisconsin State Bar; Virginia Mueller, Rep. Ott's office; Adam Gerol, Ozaukee County District Attorney; Tony Gibart, End Domestic Abuse Wisconsin; Nancy Rottier, Director of State Courts office.

I. Call to Order and Roll Call

Chair Bertz called the meeting to order at 9:30 a.m. Attorney Southwick introduced new members Devon Lee, State Public Defender's office and Judge Michael Fitzpatrick, Rock County Circuit Court.

II. Approval of November 15, 2013 Minutes

MOTION: Council member Myers moved, seconded by Council member Wagner, to approve the November 15, 2013 meeting minutes as submitted. Motion approved unanimously.

III. Discussion and/or Action Regarding Potential Projects

A. Uniform Electronic Recordation of Custodial Interrogations Act

Attorney Southwick reported that Wisconsin's Uniform Law Commission requested that the Judicial Council review the Uniform Electronic Recordation of Custodial Interrogations Act and make a recommendation regarding whether it should be proposed for adoption in Wisconsin. Wisconsin currently has statutory provisions addressing recording custodial interrogations (Wis. Stats. §§ 938.195 and 968.073), but the Uniform Act may provide more guidance than the current statutes.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to refer this issue to the Council's Criminal Procedure Committee for further study and a recommendation. Motion approved unanimously.

B. Wage Garnishment Procedure

Prior to the meeting, Attorney Southwick circulated correspondence regarding a wage garnishment problem reported by one of Senator Sheila Harsdorf's constituents. Council member Shriner stated that although there may be room for general improvement of the garnishment statutes, he does not believe this particular provision is in need of amendment. Council member Pliskie agreed, and stated that his office does collection work in three different states. In his experience, Wisconsin is already the least restrictive of those states with regard debt collection.

Members discussed the current wage garnishment procedure. Council member Schultz recalled that amendments to the garnishment procedure may have been a past Judicial Council project. Council member Roggensack stated that Chapter 816 already provides for supplemental proceedings to aid in the execution of judgments. Council member Ptacek suggested that locating the debtor is not a problem that is well suited to a statutory remedy.

No further action was taken.

IV. Discussion and/or Action Regarding Crime Victim Identity Rule Change Petition

Prior to the meeting, Attorney Southwick distributed a draft supreme court rule change petition and supporting memorandum proposing a new rule regarding identification of crime victims in appellate briefs and opinions. The text of the proposed rule was previously approved by the full Council.

Vice Chair Blanchard proposed minor amendments to the draft memorandum. He generally suggested that the memorandum should clarify that the proposed rule provides a small measure of privacy protection, recognizing that victim information is still readily available at the circuit court level. No amendments were proposed to the petition.

MOTION: Council member Shriner moved, seconded by Council member Weber, to file the petition as submitted and to file the supporting memorandum with the modifications suggested by Vice Chair Blanchard. Motion approved with Council members Ott and Roggensack abstaining.

Tony Gibart thanked the Council for its proactive efforts to aid crime victims.

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

Attorney Southwick stated that two guests would like to address the Council regarding AB 383, if members are willing to hear from them. No Council members objected to hearing comments from the guests, even though they were not previously scheduled.

Tony Gibart previously provided written comments regarding AB 383. He addressed the Council as an advocate for victims of domestic violence. He expressed concern with the proposed creation of a pretrial motion to dismiss the complaint. The proposed motion process permits the use of affidavits and a hearing in a very limited context. He is concerned that the process could be expanded or misinterpreted by judges, which could result in domestic assault victims being required to testify at hearings. Victims could also be subjected to increased pressure to recant. He suggested that the motion should be limited to a challenge to the sufficiency of the complaint.

Council member Schimel responded that the defendant's motion would have to assert that there is no genuine issue of material fact. He questioned how this could lead to hearings or pressure on victims to recant because under the proposed motion, inconsistent statements constitute a fact issue requiring denial of the motion without a hearing. Attorney Southwick added that the provision permitting the introduction of affidavits and a hearing is only applicable in cases where the complaint was insufficient as drafted. It gives prosecutors an opportunity to remedy the deficiency by introducing additional evidence.

Council member Shriner spoke in favor of the provision. He suggested that elimination of the preliminary hearing will benefit the criminal justice system. However, there needs to be a process for a defendant to obtain a dismissal in a case where the charge does not constitute a crime. Tony Gibart suggested that the language should be modified to state that the motion must be decided on the written submissions only, without a hearing.

Tony Gibart spoke in opposition to the provision that allows law enforcement to issue a citation and release the accused in most misdemeanor cases. He acknowledged that the bill does not permit release in domestic abuse cases. However, he suggested that law enforcement does not always recognize domestic abuse, and the definition of domestic abuse is under-inclusive. Council member Schultz clarified that the proposed statute allows release, but it does not require it. Law enforcement has discretion to make that determination.

Tony Gibart spoke in opposition to permitting district attorneys to set nonmonetary bond conditions. Council member Schimel inquired as to how the provision compares to current law under which a defendant can simply post bond pursuant to the bond schedule and be released without conditions. Mr. Gibart favored the posting of a monetary bond over placing nonmonetary restrictions on the defendant, even though neither requires that the accused appear before a judge to secure release. Council member Schimel suggested that nonmonetary conditions could offer more protection to crime victims.

Tony Gibart was concerned that AB 383 would require discoverable documents in the possession of the district attorney's office to be disclosed to defendants at the initial appearance. He suggested that this provision removes district attorneys' discretion to withhold discovery in sensitive cases where the victim could be endangered by the defendant receiving the information so quickly after arrest. He acknowledged that the proposal permits district attorneys to delay production for good cause shown, but suggested that district attorneys might not be willing to file an extra motion to demonstrate good cause to justify a delay. Council member Ptacek asked whether Mr. Gibart has compiled any information from counties around the State where

discovery is currently expedited in a manner similar to the provision contained in the bill. Mr. Gibart had no information.

Finally, Tony Gibart expressed opposition to the provision that authorizes the preemptive arrest of witnesses in any criminal proceeding when a party shows "probable cause...that it may become impracticable to secure the person's presence by subpoena." Council member Schimel stated that once a trial is underway and jeopardy has attached, a key witness's failure to appear and testify could result in a loss for the prosecution and considerable delay and expense for the judicial system. He suggested that giving prosecutors this additional flexibility might aid them in proving their cases more effectively by ensuring that important witnesses appear and testify at trial.

Council member Lee noted that a prosecutor's inability to secure testimony from a victim often results in dismissal of the case. She asked Mr. Gibart which scenario is worse for a domestic violence victim. Mr. Gibart believed that the arrest of the victim to ensure appearance would be worse than a dismissal of the domestic violence charge. Council member Lee asked whether victims sometimes avoid testifying due to safety concerns. She suggested that detention could be one method to keep the victim safe. Mr. Gibart agreed that safety concerns can be a reason that victim's do not testify.

Tony Gibart concluded by noting his support for the bill's efforts to reorganize the criminal procedure code and codify current case law.

Council member Ott reported that a public hearing on AB 383 is scheduled on January 30, 2014. He stated that if any substantive amendments are offered after the hearing, another public hearing will be scheduled. Virginia Mueller stated that proposed amendments to the bill must be submitted to the Legislative Reference Bureau for drafting by Monday, January 20, 2014 to be completed for the judiciary committee's review at the hearing on January 30, 2014.

District Attorney Adam Gerol addressed the Council in his capacity as President of the Wisconsin District Attorneys Association (WDAA). D.A. Gerol submitted comments on AB 383 to Council member Ott's office on January 16, 2014 via email. Council member Ott provided copies of those comments to Council members at the meeting. Members took a mment to review the email. D.A. Gerol clarified that the email was a shorthand version of the concerns raised by the WDAA. He also stated that the WDAA hopes to be able to offer some suggestions for amendments to AB 383.

D.A. Gerol stated that the pretrial motion to dismiss is the one element of the proposed bill to which the WDAA most objects. D.A. Gerol suggested that prompt prosecutions were a significant concern when the bill was originally drafted, but that is no longer a concern due to changes such as the *Riverside* decision and improvements in technology. He opined that the recent change to allow hearsay testimony at preliminary hearings has solved the problems that were originally driving the committee's recommendations to eliminate preliminary hearings. He suggested that the new motion procedure was based on Minnesota's omnibus hearing, and argued that the problems Minnesota was attempting to address are not present in Wisconsin. He also objected because preliminary hearings only apply to felonies while the new motion

procedure applies to all criminal cases. He objected to the specific language used in the bill and suggested that it could take judges years to define the standard of "genuine issue of material fact," even though judges already use that standard to rule on motions to dismiss in civil cases. He also expressed concern that judges will not follow the rule correctly because the drafting committee's notes were not included in the bill. He speculated that instead of strictly applying the rule, judges would incorrectly default to allowing a hearing in every case. He suggested that the current preliminary hearings that rely on hearsay are more efficient. As an example, he cited a case that simply involved a police officer reading the complaint. He supported that process because it achieves the goal of finding probable cause quickly. D.A. Gerol concluded that the current preliminary hearing process is working fine and there is no reason to change it.

Council member Schimel disagreed because preliminary hearings waste resources. Prosecutors and law enforcement must travel to court for a hearing only to have defendants waive it in most cases. Police departments pay officers overtime to sit at the courthouse waiting to testify, only to have the hearing canceled at the last minute. He suggested that a motion practice would be more efficient because motions will not be filed in every case, but only in those rare cases where probable cause appears to be an issue.

D.A. Gerol felt that the change to allow prosecution of misdemeanors by using the citation as the charging instrument is no longer needed because technology (e.g. computers) has made it easy for prosecutors to draft complaints. He felt charging from a citation would be a step back because defendants may be given less information than they currently receive in the complaint. He also suggested that allowing prosecutions from the citation could result in improvident prosecutions because over-burdened prosecutors might sign off on the citations and allow cases to move forward without even reading the police reports.

D.A. Gerol spoke in opposition to allowing district attorneys to set nonmonetary bond conditions. He suggested that court commissioners can set bond conditions or defendants can post monetary bond based on the bond schedule, so the proposed change is unnecessary. He proposed that even though the defendant may be merely writing a check to gain release, the amount is based on a bond schedule previously approved by the chief justice as a result of judicial contemplation.

D.A. Gerol suggested that earlier production of discovery is unnecessary. He stated that district attorneys are already giving discovery to defendants as quickly as possible. He agreed that delaying production does not do anyone any good. He represented that current practice is to copy all discoverable information onto a compact disc (C.D.), which is provided to the defendant when he or she enters a plea. D.A. Gerol disagreed with Mr. Gibart's assumption that prosecutors would not seek to withhold information for good cause, stating that he would not hesitate to seek permission to withhold information if it was confidential or sensitive in nature.

D.A. Gerol objected to the speedy trial provisions. He represented that a trial within 45 days on a misdemeanor charge is not possible in counties like Milwaukee. In smaller counties, he represented that it is not possible to assign the case to another judge when the court is unable to schedule a timely trial. He also argued that it is impossible to obtain chemical lab reports within 45 days, so the proposed provision will result in the dismissal of cases.

Finally, D.A. Gerol expressed concern that words are used inconsistently in the criminal procedure code, although he provided no examples.

D.A. Gerol stated that prosecutors support some new provisions in the bill, including the ability to obtain non-testimonial evidence from third parties, and the ability to subpoena corporations.

D.A. Gerol stated that the position of district attorney is now a career position for most prosecutors and they have a very collegial relationship with the defense bar, judges and victims groups. He represented that the district attorneys could produce a better work product in six months. For example, they could get rid of arcane practices such as affidavits in support of search warrants and subpoenas and replace them with affidavits under declaration of perjury as used in the federal system.

Council member Ott asked whether there was sufficient time to amend the bill to address the WDAA's concerns. D.A. Gerol responded in the negative and indicated that it would take more time because many of the provisions in the bill are linked to other amendments in the bill.

Council member Weber asked whether the Council received advance notice that Tony Gibart and Adam Gerol would be addressing the Council at the meeting. Attorney Southwick responded in the negative. Council member Weber indicated that while the Council is willing and interested in hearing from stakeholders, even very late in the process, Council members would certainly prepare differently for the meeting if they had advance notice that stakeholders were going to provide comments. Council member White agreed that the lack of notice impaired the Council's ability to make full use of the information presented or provide a response.

Council member Gleisner asked D.A. Gerol how long he has known about the pending bill. D.A. Gerol admitted that he has known since 2008 that the Council was working on the proposed amendments. Council member Gleisner inquired as to why the district attorneys waited so long to offer comments. D.A. Gerol stated that the WDAA waited until a bill was introduced. Council member Gleisner noted that the bill was introduced four months ago and was awaiting its third public hearing.

Council member Shriner stated that the Judicial Council has finished its work on the bill. It has been introduced in the Legislature and is moving through the public hearing process. Council member Shriner agreed that stakeholder comments are helpful, but at this point in the legislative process, the stakeholders should be addressing their comments to the Assembly and Senate Judiciary Committees, not to the Judicial Council.

Council member Ott noted that AB 383 is going to take longer to move through the legislative process due to its large size. For example, the judiciary committees are deviating from their usual procedure by holding multiple hearings on the bill. Council member Shriner observed that the judiciary committees might need to delay the bill for six months to allow time for amendments to be drafted. Council member Ott suggested that since the Legislature is nearing the end of the current session, the bill might need to be reintroduced in the next session

to give all groups time to thoroughly review it and allow the Council to address stakeholder concerns.

VI. Discussion/Action Regarding Presentence Investigation Report Bill

Previously, Council member Grothman reported that his office is considering a bill to permit crime victims access to certain portions of the presentence investigation (PSI) report, including the sentencing recommendation and victim information. The Council and its Appellate Procedure Committee previously considered the issue and offer feedback.

Attorney Southwick reported that Senator Grothman's proposal has been introduced as a bill. Attorney Southwick spoke with Representative Pat Strachota about the possibly of combining the proposal with the Council's draft 2013 presentence investigation report bill.

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

Attorney Southwick reported that the bills have passed out of committee as amended. Senator Grothman's staff indicated that no further assistance is requested from the Council.

VIII. Committee Reports

Attorney Southwick reported that new committee chairs were appointed due to Council member Stephens's retirement from the Council. The Criminal Procedure Committee will be chaired by Council member Blanchard and the Appellate Procedure Committee will be chaired by Council member Ptacek.

A. Appellate Procedure

Attorney Southwick reported that the committee continues to work on the issue of prisoner challenges to agency decisions. The committee has asked the Legislative Reference Bureau (LRB) to draft a bill consolidating the rules into one subchapter of the code. As the committee awaits a draft bill, it will begin its next study project: Rule 809.15, the record on appeal.

B. Criminal Procedure

Committee chair Blanchard reported that the committee continues to study the issue of law enforcement's use of GPS devices and other technology for geolocation tracking. The committee is currently drafting a white paper to provide information and guidance to the Legislature. Rep. Ott stated that a bill has already moved through the Assembly Judiciary Committee. Adam Gibbs indicated that although the current bill may be moving too quickly to benefit from the committee's white paper, Fourth Amendment issues are likely to continue to arise. He suggested that that the paper will be useful in the future as other legislation is drafted.

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.

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. Unfortunately, Judge Leineweber has resigned from the committee so the committee will not benefit from the research he had proposed.

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. The federal rules committee is also studying the issue and recently released a proposed rule draft.

IX. Other Business

A. PPAC Liaison's Report

Nancy Rottier stated that PPAC has a meeting scheduled for the following week.

B. Council Attorney's Report

Attorney Southwick reported that due to planned renovations at the Capitol, the Council will have to move the location of this year's June volunteer recognition meeting. The meeting is usually held in the Assembly Parlor. This year, it will be moved to Room 412E.

X. Adjournment

The Council adjourned at 11:20 a.m.