

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 18, 2011

The Judicial Council met at 9:30 a.m. in State Court Conference Room 302, Tenney Plaza, 110 East Main Street, Madison, Wisconsin.

MEMBERS PRESENT: Vice Chair Professor David E. Schultz, Thomas W. Bertz, Allan M. Foeckler, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Greg Weber, Honorable Maxine A. White, Nicholas C. Zales.

MEMBERS EXCUSED: Chair Beth E. Hanan, Michael R. Christopher, Honorable Patricia S. Curley, Stephen Miller, Representative Jim Ott, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Peg Carlson, Court of Appeals Chief Staff Attorney; Professor Meredith Ross, University of Wisconsin Law School; Jule Cavanaugh and Denise Symdon, Department of Corrections.

I. Call to Order and Roll Call

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

II. Approval of January 21, 2011 Minutes

MOTION: Council member Bertz moved, seconded by Council member Weber, to approve the January 21, 2010 minutes. Minutes were approved unanimously without amendment.

III. Discussion Regarding Recommendations from the Appellate Procedure Committee Regarding Presentence Investigation Reports

Appellate Procedure Committee Chair Marla Stephens welcomed fellow committee members Peg Carlson, Meredith Ross, and Jule Cavanaugh, as well as Denise Symdon from the Department of Corrections. Council member Stephens noted that ss. 809.14 (3) and 809.30 of the proposed amendments regarding presentence investigation reports have been discussed, but the Council has not formally approved them.

MOTION: Council member Stephens moved, seconded by Council member Shriner, to approve the proposed amendments to Wis. Stats. §§ 809.14 (3) and 809.30 (2) (k). Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens resumed the discussion of changes regarding report content. She explained that s. 972.15 (2a) (e) is meant to provide judges with information regarding restorative justice participation that may be available to the defendant. Council member Wagner suggested that the provision should also include information regarding restorative justice efforts

already undertaken by the defendant because sometimes the defendant completes a program or takes other restorative justice action prior to sentencing.

Council member Stephens explained that the qualifier "in appropriate cases" is intended to give the PSI report writer some discretion. Council member White suggested that this language places a burden on the report writer to make the decision regarding whether to include the information. Council member Wagner suggested that the report writer is the appropriate person to know whether there is a program available that would be applicable to the defendant's situation, recognizing that in some cases, there is no restorative justice program that would apply. Council member Stephens added that under the proposal, the report will be presented to the prosecutor and the defense attorney, and they will have an opportunity to provide input prior to submission of the report to the judge. Therefore, it is not wholly left to the discretion of the report writer to identify restorative justice opportunities. Council member White suggested that information regarding program participation already undertaken should not be discretionary. Denise Symdon added that the Department of Corrections' (DOC) operations manual also provides instruction to report writers regarding identifying restorative justice programs, and additional guidance can be added by DOC, if needed.

Council member Bertz inquired as to whether all jurisdictions have restorative justice programs. Council member Ptacek explained that the term is quite broad and although some specialty programs are only available in certain communities, the term also includes restitution and community service work, which generally are available in all jurisdictions.

MOTION: Council member Bertz moved, seconded by Council member Ptacek, to approve the proposed amendments to Wis. Stat. § 972.15 (2a) (e), modified as follows: "Information about program participation or other efforts that the defendant has undertaken, or in appropriate cases, could undertake to repair the harm to the victim and the community caused by the crime." Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens explained that the proposed amendments to ss. 972.15 (1), (2b), (2c), and (2s) consist solely of adding titles.

MOTION: Council member Stephens moved, seconded by Council member Wagner, to approve the proposed amendments to Wis. Stat. § 972.15 (1), (2b), (2c), and (2s). Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens explained that the proposed changes to s. 972.15 (2a) (f) requires the inclusion of information to aid in calculating sentence credit. This change is intended to reduce the number of disputes at the appellate level involving sentence credit calculations. Additionally, if the calculation is challenged, the creation of a record under this provision will enable the appellate court to resolve the dispute more easily.

Council member Shriner asked about the source of disagreement in calculating sentence credit. The judicial members agreed that currently it is very difficult to obtain information regarding the dates of custody and information regarding the offense for which the defendant was in custody. This problem is even greater if the defendant was in custody in another state.

Council member Roggensack asked whether the report writer would need to obtain paperwork to verify the information provided in this section. Council member Stephens responded in the affirmative, indicating that paperwork should be obtained if it is available. Council member Roggensack suggested that the statute should clarify that it includes out-of-state custody. Council member Ptacek suggested the addition of a note or comment to reflect the requirements in terms of what custody credit must be included. Council member Weber agreed, suggesting that the current rules regarding sentence credit calculation are very complex.

Denise Symdon stated that it makes sense to provide the information for a defendant who is currently on supervision. However, she expressed concerns with DOC's ability to provide sentence credit information for a defendant who is not actively on supervision, due to difficulties obtaining the information in a timely manner. Council member Stephens stated that sentence credit is a finding that the court is required to make at sentencing, so she believes the goal should be to provide as much information as possible to support the finding.

Council member Leineweber agreed that s. 973.155 (sentence credit) is very difficult to apply and suggested that the report writer may not be able to provide an effective analysis. Council member Shriner proposed that the Judicial Council study and make a recommendation regarding the rules on sentence credit. He clarified that it would be a project separate from the current PSI proposal, and suggested that it be undertaken by the Criminal Procedure Committee. A number of council members requested that this item be placed on a future agenda for consideration as a new project.

Council member Stephens asked for clarification regarding Council member Ptacek's suggestion to add a note or comment. He suggested that additional language be added to clarify that the provision includes locations of out-of-state custody.

MOTION: Council member Stephens moved, seconded by Council member Bertz, to approve the proposed amendments to Wis. Stat. § 972.15 (2a) (f), modified as follows: "...locations of custody (in-state or out-of-state) since the defendant was first arrested..." Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens explained that the proposed changes to s. 972.15 (2m) require that victim information shall be contained in a section that is capable of being severed from the PSI report. This proposed change is a result of concerns expressed by victim rights advocates, although prosecutors objected to the proposal because they believe placing it in a separate section diminishes the importance of the victim information. Council member Wagner stated that prosecutors regularly ask the court to exclude victim information prior to sending PSI reports to DOC. Jule Cavanaugh stated that although DOC objected to a previous proposal to include victim information in an addendum at the back of the report, it does not object to the proposal as it is currently written.

Council member Stephens explained that the proposed changes to s. 972.15 (3) make clear that the court can issue a protective order as necessary to protect anyone who is named or discussed in the PSI material. It also contains a provision to provide post-sentencing alerts by

requiring the clerk of court to note the existence of a protective order on the judgment of conviction and requiring DOC to note it on the cover sheet to the final PSI report.

MOTION: Council member Stephens moved, seconded by Council member Leineweber, to approve the proposed amendments to Wis. Stat. § 972.15 (2m) and (3). Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens addressed the proposed changes to s. 972.15 (8) and explained that the committee agreed that violations of the confidentiality provisions should result in a penalty, although the committee had a difficult time determining what the penalty should be.

Vice Chair Schultz questioned whether crimes should be defined in statutory provisions outside the criminal code. Council member Roggensack questioned the need for imprisonment, and suggested that a fine alone would be sufficient. Council member Wagner questioned the reasonableness of enforcing this provision against the subject of the report, and questioned who the provision is meant to deter. She suggested that under the current rules, DOC employees would be in violation of their public duties if they disclosed information.

Council members discussed the definition of presentence materials, found in s. 972.15 (1b) (materials include the PSI draft, any objections to it, including court findings, and the final report). Council member Stephens stated that the provision is meant to deter disclosure of the actual materials, not necessarily the information contained therein, and agreed that the language could be clearer. She suggested that this provision be removed from the proposal.

Council member Bertz asked whether disclosure could rise to a civil action for damages. Council members did not rule out that possibility, but agreed that other avenues such as contempt of court may be a better deterrent. Denise Symdon stated that currently, a PSI report found in a defendant's possession is confiscated. She asked whether this provision would require DOC to call local law enforcement to report it as a crime.

MOTION: Council member Wagner moved, seconded by Council member Shriner, to withdraw the proposed amendments to Wis. Stat. § 972.15 (8), relating to a criminal penalty for the disclosure of PSI material. Council member Stephens offered a friendly amendment to also strike any cross-references to sub. (8) from the draft. The amendment was accepted and the amended motion approved unanimously, with Council member Roggensack abstaining.

Council member Wagner asked about the phrase "If the defendant is under 21 years of age," found in s. 972.15 (2s). Council member Stephens clarified that the language was not modified by the draft, and that phrase reflects current law.

Council member Stephens announced that at next month's meeting at Marquette University Law School, the Council will resume its review of the PSI proposal by discussing the recommendations regarding the report review process.

V. Committee Reports

A. Appellate Procedure

In Chair Hanan's absence, Council member White reported that at the previous meeting, the committee continued to discuss ghostwriting. *Ad hoc* member Ann Zimmerman, who is also a member of the PPAC subcommittee that is studying limited scope representation, provided some models from other states. Some rules require disclosure of a lawyer's assistance, while others require that the lawyer be identified. The committee will continue working on a proposal based on a rule from another state.

Vice Chair Schultz asked for more information regarding the study process used by PPAC. Council member Leineweber explained that the subcommittee would study the issue and provide a full report to PPAC. PPAC would then decide whether to pursue further action to implement any recommended changes. Attorney Southwick added that the PPAC subcommittee has asked for the Appellate Procedure Committee's recommendation by May 2011 so that they can incorporate it into a report to PPAC by August 2011.

B. Criminal Procedure

There was no report.

C. Evidence and Civil Procedure

Council member Leineweber reported that the Evidence & Civil Procedure Committee continued its review of the rules of evidence. Committee members agreed to table their review of Wis. Stats. §§ 907.03 and 907.05, bases of expert opinion, in light of the recent legislation amending the rules regarding expert testimony. The committee will continue to monitor the new rules in practice, and may make a recommendation in the future regarding whether additional amendments are needed.

MOTION: Council member Leineweber moved, seconded by Council member Bertz that the Evidence & Civil Procedure Committee continue to monitor developments of the *Daubert* approach to expert witness testimony, and postpone making any further recommendations. Motion to approve course of action approved unanimously.

At its meeting later today, the committee will continue to discuss Wis. Stat. § 908.06, character for truthfulness, and Rule 502 of the Federal Rules of Evidence, inadvertent disclosure of privileged information.

VI. Other Business

A. Supreme Court Advisory Committee on Rules Petitions Procedure Report

There was no committee report.

B. PPAC Liaison's Report

There was no committee report.

C. Council Attorney's Report

Attorney Southwick reported that most of the details have been finalized for the Council's meeting at Marquette University Law School on March 18th. She has received the room assignment, as well as information on parking validation. However, Attorney Southwick stated that she will be unable to attend the meeting due to a medical issue. She will be available to send out the meeting materials and provide notice of the meeting. She'll also be available to finalize the parking details, although she asked members to confirm their attendance by March 14th so that she has sufficient time to provide the university with a list of attendees. She also asked members to notify her as soon as possible if there are groups that members would like her to invite to attend the meeting. She explained that the university's event capture system, which would allow the meeting to be relayed to remote locations, requires the use of microphones and the university is not equipped to provide microphones for up to twenty members. There would also be a cost, although that would depend on the length of the meeting. She asked the Council for a decision regarding the use of the system. The Council agreed by consensus to decline the use of the event capture system.

Attorney Southwick received an inquiry from the Legislative Fiscal Bureau regarding the budget calculations for the Council's full funding requests. She provided the information and has received no other inquiries. The Governor's budget is expected to be released on February 22, 2010.

VII. Adjournment

The Council adjourned by consensus at 11:00 a.m.