

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
April 15, 2011

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

**MEMBERS PRESENT:** Chair Beth E. Hanan, Vice Chair Professor David E. Schultz, Thomas W. Bertz, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Thomas L. Shriner, Rebecca St. John, A. John Voelker, Honorable Mary K. Wagner, Nicholas C. Zales.

**MEMBERS EXCUSED:** Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Representative Jim Ott, Honorable Patience Roggensack, Marla J. Stephens, Honorable Maxine A. White, Senator Rich Zipperer.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Professor Meredith Ross, University of Wisconsin Law School.

**I. Call to Order and Roll Call**

Chair Hanan called the meeting to order at 9:45 a.m.

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

Appellate Procedure Committee member Meredith Ross led the continued discussion regarding recommended amendments to the rules regarding presentence investigation (PSI) reports. The existing provision in Wis. Stat. § 972.15 (4m) addressing access to the presentence investigation report by an unrepresented defendant has been moved to a separate section. The proposed amendments to s. 972.15 (4m), Retention of Presentence Investigation Material by Counsel, require both the prosecutor and defense attorney to provide PSI material in their possession to successor counsel. Current law does not provide clear direction regarding successor counsel's access to PSI materials.

Council member Shriner stated that successor defense counsel cannot always obtain the PSI report from prior counsel, so successor counsel should be permitted by statute to obtain a copy from the court or the prosecutor. He suggested that the statute should clearly state that successor counsel has a right to obtain a copy of the PSI report without a court order. Council member Wagner suggested that other entities, such as out-of-state prosecutors and corrections officials, should also have access to PSI reports without a court order. Attorney Southwick noted that sub. (5) allows, but does not require, the Department of Corrections (DOC) to release the report to other agencies for purposes such as correctional programming and parole.

Council member Wagner noted that the definition of PSI materials includes more than just the final version of the report. She stated that if a court receives an inaccurate report, the judge may order a new report, and destroy the original draft. She inquired as to whether that

practice would be inconsistent with the proposed rules. Committee member Ross explained that a goal of the amendments is to create a more complete record for purposes of appeal, but she suggested that if the parties had no objection to destroying the report and replacing it with a more accurate version, it probably would not be inconsistent with the proposed rules.

**MOTION:** Council member Shriner moved, seconded by Council member La Fleur, to refer proposed s. 972.15 (4m) back to the Appellate Procedure Committee for further drafting consistent with the Council’s discussion regarding making the PSI material generally available to successor counsel without the need for a court order, including when successor counsel is not able to obtain the material from prior counsel. Motion approved unanimously.

Vice Chair Schultz noted that sub. (4m) of the draft changes “district attorney” to “prosecutor,” but other sections (such as sub. (2)) retain the use of “district attorney”. He stated that the draft bill amending the rules of criminal procedure contains a more comprehensive definition of “district attorney,” and suggested that the Council should make a note to compare the two drafts to insure consistency.

Committee member Ross explained that newly created sub. (4p) contains the provision that was moved from sub. (4m) addressing access to the PSI report by the defendant. The working note clarifies that the defendant is allowed to view the PSI materials at any time during or after the sentencing proceedings. This provision modifies *State v. Parent*, 2006 WI 132, ¶49, 298 Wis. 2d 63, 725 N.W.2d 915, which currently requires an unrepresented defendant to obtain circuit court permission to view his/her PSI report or use it on appeal. The working note leaves it to the discretion of DOC (if the defendant is under the control of the department) or the court to determine the manner in which to provide the defendant access to the report. She added that under current law, defense counsel is often very reluctant to allow a defendant to view his or her PSI report due to the post-sentencing confidentiality requirements.

Committee member Ross noted that the working note to sub. (4p) states that this amendment is not retroactive. Council member St. John suggested that the Appellate Procedure Committee should reconsider its recommendation regarding retroactivity. Chair Hanan informally referred the issue of retroactivity back to the Appellate Procedure Committee for clarification.

Council member Ptacek inquired about enforcement of the confidentiality provision in sub. (4p). Committee member Ross stated that since the Council opted to remove the penalty provision, a violation would probably be treated as contempt of court because it is a court document. Council member Shriner noted that the report is confidential by statute, not court order, so he questioned whether it could be treated as contempt of court. Council member Wagner suggested adding a provision to grant the court contempt powers to address a violation.

**MOTION:** Council member Shriner moved, seconded by Council member Bertz, to refer 972.15 (4p) back to the Appellate Procedure Committee for further consideration regarding enforcement of the confidentiality requirement. Motion approved unanimously.

Committee member Ross explained that the amendments to subs. (5) and (6) insert the word “final” prior to “presentence investigation report”.

**MOTION:** Council member Bertz moved, seconded by Council member Ptacek, to amend s. 972.15 (5) and (6) to insert the word “final” before the phrase “presentence investigation report”. Motion approved unanimously.

Committee member Ross explained that sub. (7) was proposed to clarify DOC’s authority to make post-sentencing corrections to material factual errors in PSI reports. DOC supports this amendment, and the committee received no opposition to this proposed provision. This change is important because often when a defendant files a post-sentence appeal to correct an error, the court declines to address it if it was not a fact considered in the sentencing, although it could be a fact that has an impact on defendant’s programming. Council member La Fleur asked whether “material” is defined. Committee member Ross stated that it is not specifically defined. It was added to distinguish between important facts and minor errors so that defendants do not seek corrections to every minor detail.

**MOTION:** Vice Chair Schultz moved, seconded by Council member Wager, to approve the additional of proposed s. 972.15 (7), Corrections to Final Presentence Investigation Report, with a friendly amendment to insert the word “that” between “requests” and “the”.

### **III. Discussion and/or Action Regarding Length of Supreme Court Petitions for Review**

Attorney Southwick previously distributed a copy of Wis. Stat. § 809.62, Petitions for Review, as well as Minnesota Rule 117. Chair Hanan stated that Wisconsin currently sets a thirty-five page limit on petitions of review, while Minnesota limits supreme court petitions in civil cases to only five pages. She added that criminal cases are allowed ten pages. She suggested that perhaps shorter petitions may make the parties focus on the specific criteria relevant to supreme court review, which may result in a more efficient review process for court commissioners. She also noted that shorter petitions may translate into cost savings for the litigants. She suggested that the Council may wish to ask the Appellate Procedure Committee to study the length of petitions for review and make a recommendation.

Council member Leineweber asked whether the Council has received any information from the court regarding its view of the process. Chair Hanan stated that she is in the process of obtaining feedback. Council member La Fleur suggested that information regarding the number of petitions filed compared to the number accepted in other states that have a shorter page limit may be helpful in making a determination regarding whether to study this issue further.

Chair Hanan suggested that this item be placed on the Council’s May agenda for further consideration and discussion.

### **IV. Committee Reports**

#### **A. Appellate Procedure**

Attorney Southwick reported that the Appellate Procedure Committee met on April 8<sup>th</sup> to continue to discuss ghostwriting and limited scope representation. The committee has a May 10<sup>th</sup> conference call scheduled with several of the drafters that serve on the PPAC limited scope representation subcommittee. The committee will defer any recommendations until after that conference call, but is still on track to make a recommendation prior to the PPAC subcommittee's August deadline.

**B. Criminal Procedure**

Vice Chair Schultz reported that he is going to prepare an outline regarding the history of the comprehensive criminal procedure amendments and objectives for Council review and discussion at its next meeting so that members can consider how best to move forward with the project.

**C. Evidence and Civil Procedure**

Council member Leineweber reported that the Evidence & Civil Procedure Committee will continue to discuss Wis. Stat. §§ 906.08, 906.09, and preservation/spoliation at its meeting later today.

**V. Other Business**

**A. Supreme Court Advisory Committee on Rules Petitions Procedure Report**

Chair Hanan reported that the Supreme Court Advisory Committee was tasked with evaluating possible changes to the procedures for submitting rule change petitions. The committee met four times and has reached some general recommendations that will be sent to the full court for further consideration. The committee discussed dissemination of information to the public, and a modification has been made to the court's web site to add a tab titled "Rules," along with links for information such as pending petitions, archived petitions, and petition templates. There will also be a link to allow the electronic submission of comments. The recommendations did not include the addition of strict deadlines for the rule change petition process.

Council member Shriner asked whether the committee considered the process used at the federal level, in which the supreme court is the final step of the process and not the first step. Chair Hanan responded in the affirmative, indicating that the committee received a great deal of information, including information about the federal rules advisory committees and the procedures used in a number of other states.

**B. PPAC Liaison's Report**

There was no committee report.

**C. Council Attorney's Report**

## 1. Budget

Attorney Southwick reported that she has received very few questions or inquiries regarding the Judicial Council's budget request. The Legislative Fiscal Bureau inquired about the formula used to calculate the Council's rent increase and fringe benefit estimates. She provided the requested information and an explanation regarding why the Council's rent increase request was significantly less than the amount projected using the standard formula. She also noted that the Judicial Council was not one of the agencies asked to provide testimony at the budget briefings held by the Joint Finance Committee.

## **VI. Adjournment**

Chair Hanan announced that the next Council meeting will be on May 20<sup>th</sup>, and the Evidence & Civil Procedure Committee will meet today at noon in the Judicial Council office.

The Council adjourned by consensus at 11:15 a.m.