

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
May 20, 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, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, Rebecca St. John, A. John Voelker, Nicholas C. Zales.

MEMBERS EXCUSED: Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Catherine A. La Fleur, Representative Jim Ott, Honorable Mary K. Wagner, Honorable Maxine A. White, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Attorney Bill Gleisner; Adam Korbitz, State Bar of Wisconsin.

I. Call to Order and Roll Call

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

II. Approval of March 18 and April 15, 2011 Minutes

MOTION: Council member Bertz moved, seconded by Council member Stephens, to approve the March 18, 2011 minutes. Council member St. John noted that she should be listed as an excused member in lieu of Greg Weber. Attorney Southwick asked for clarification regarding the identity of the members who seconded the motions raised at the March meeting. Council member Shriner seconded the motion to refer s. 972.15 (2) back to the Appellate Procedure Committee for further review and revision. Council member Bertz seconded the motion to approve the draft amendments to ss. 804.01 and 905.03. Minutes were approved unanimously with the noted amendments.

MOTION: Vice Chair Schultz moved, seconded by Council member Bertz, to approve the April 15, 2011 minutes. Minutes were approved unanimously without amendment.

III. Discussion Regarding Review, Circulation, and Introduction of Bill Amending Criminal Procedure Rules

Prior to the meeting, Council members received a memo from Vice Chair Schultz regarding the history, general approach, and summary of major changes with regard to the proposed amendments to the rules of criminal procedure. Vice Chair Schultz explained why the Judicial Council accepted the project, stating that the Council conducted the last comprehensive revision of the criminal procedure code and had undertaken a number of significant revisions to various sections of the code over the years. The Uniform Commissioners on State Laws asked the Council to evaluate the Uniform Rules of Criminal Procedure. The Council determined that

the criminal procedure statutes needed a complete review because provisions were hard to find, organization had broken down as new provisions were added, and case law needed to be codified. The Council created a special committee with representation from district attorneys, assistant attorneys general, public defenders, private defense lawyers, judges, and academics. The committee reached general consensus on the final proposal.

Vice Chair Schultz summarized the major changes and explained that many of the changes will increase efficiency and save time, which likely will result in cost savings. He highlighted changes such as encouraging prompt disposition of misdemeanors. He noted that elimination of the preliminary examination in felony cases is the change for which the proposal has become recognized. He explained that the development of case law has limited the value of the preliminary hearing, and it has developed unofficial functions that do not justify its continued existence. The committee determined that the unofficial functions of the preliminary examination can be better served through new provisions that were created to urge more complete and earlier discovery. A provision also was created to allow a motion for pretrial dismissal.

The amendments clean up some troublesome statutes, including consolidation of charges from more than one county and John Doe procedures. Discovery rules and bail statutes are reorganized to make them more accessible and understandable. Provisions relating to competency to stand trial and the insanity defense are reorganized in a new chapter. Several statutes are created to provide new authority or to clarify procedures to make the process more efficient and reduce court involvement.

The Judicial Council previously approved the committee's revision of chapters 967 through 972, 974, 975, and 979 of the Wisconsin Criminal Procedure Code. The draft was referred to the Legislative Reference Bureau. After several rounds of revisions, the draft is now nearly complete in bill form. Vice Chair Schultz suggested that the full Council review and re-approve it since there has been a considerable turnover in membership since the proposal was last approved by the full Council. Council member Shriner supported the suggestion that the full Council review the proposal.

Council member Shriner inquired as to the reason the draft bill was delayed at the Legislative Reference Bureau (LRB). Vice Chair Schultz explained that the Council initially sent the proposal to the LRB seeking a preliminary draft that was not for introduction. The Council was unaware at the time that bill drafts that are not prepared for introduction are given very low priority. There were also several rounds of questions from the LRB drafters. Council member Shriner asked whether new cases have rendered the draft out-dated. Vice Chair Schultz responded in the negative and explained that throughout this process the drafters have updated it to reflect current case law.

Chair Hanan inquired as to when the LRB is expected to complete the final revisions. Vice Chair Schultz explained that the Council's work group (members include Schultz, Stephens and St. John) needs to provide LRB with responses to some questions before they can resume work on the draft. He added that the questions are not too complex and are not substantive, so it should not take the work group long to prepare responses. Council member Roggensack asked

about the form of the most recent draft. Vice Chair Schultz stated that the LRB has prepared both a traditional bill and a clean copy that is much easier to read. Council member Bertz inquired as to whether the bill contains notes to identify and explain the changes. Council member Miller stated that the LRB will prepare a bill analysis but it will not address every change. Vice Chair Schultz added that the Council's original draft contains notes identifying each change, but it is unlikely that many of those notes will carry over into the final legislative bill draft.

Council member Stephens suggested that the current version should be circulated to the full Council so that members could begin reviewing it over the summer. Vice Chair Schultz agreed, and stated that because the outstanding questions to be resolved for the LRB drafters are not substantive, it will not result in any significant changes to the current draft. He suggested that Attorney Southwick distribute both the bill draft and the clean copy of the chapters. He agreed that if members review the draft over the summer, it can be placed on the Council's September agenda for further discussion. Council member Stephens and Vice Chair Schultz added that it also may be helpful to members to receive a copy of the Criminal Procedure Committee's original proposal. Attorney Southwick noted that she does not have an electronic version of the original proposal. Vice Chair Schultz agreed to create a scanned version of the document. Attorney Southwick stated that she will send the drafts by separate email due to the large size of the attachments.

IV. Discussion and/or Action Regarding Budget and Staffing

Chair Hanan reminded council members that the Judicial Council study conducted by the National Center for State Courts recommended that the Council focus its time and efforts on large projects addressing court procedural matters, such as the amendments to the criminal procedure code. She also noted that the amendments to both the rules of discovery and evidence to address clawback issues will be ready for submission to the supreme court as a rule change petition in the fall. She added that the comprehensive review and recommendations regarding the rules of evidence also likely will be concluded in the upcoming Council year. Revisions to the rules probably will require both legislation and a supreme court rule change petition. The recommendations regarding presentence investigation reports will be finalized in the near future. Those amendments probably will require both a supreme court rule change petition and legislation.

In light of these major projects that will be ready for introduction in the upcoming year, the Council must consider how and who will sustain the energy to see these project through to their completion. The Council will have a number of new members in the up-coming year. Several members announced the end of their council terms, including Chair Hanan and Council members Leineweber and Zales. Council member Miller, Chief of the Legislative Reference Bureau, announced that he will be designating Deputy Chief Cathlene Hanaman to serve in his place next year. Attorney Hanaman is one of the primary drafters working on the Council's criminal procedure bill. Chair Hanan also reminded members that they will soon be electing new leadership for the 2011-2012 year.

In light of the major upcoming projects, the Council also will need to plan for staffing. Chair Hanan stated that although the Joint Finance Committee made significant cuts to the Council's budget that would deprive the Council of a staff attorney, she remains cautiously optimistic that creative solutions can be found to restore funding and allow the Council to continue to function efficiently with the aid of staff. She noted that the Council adds value far in excess of its modest budget.

However, in the event that funding is not restored, the Council will need to plan for ways to accomplish its projects without the assistance of staff. Chair Hanan suggested that members consider prioritization of projects and alternative ways to obtain assistance to complete projects. She suggested exploring the possibility of internships through the law schools, although she noted interns require supervision. She also suggested appointing additional ad hoc committee members to assist with research and drafting.

Council member Leineweber suggested that the criminal procedure code amendments should be a high priority since the Council has already invested many years of work on the project. Council member Zales suggested that the Council request some support from the State Bar. Chair Hanan suggested that the Council may wish to consider creating an executive committee to assist the chair and vice chair with administrative functions. Council member Ptacek suggested that the various appointing authorities holding seats on the Council should coordinate their efforts to communicate with the legislature regarding the Judicial Council and how its work benefits the legislature, as well as the courts. Chair Hanan noted that the Council's work on the criminal procedure code amendments takes a great burden off the legislature because when the Council presents the bill, many years of research will have been done, and supporters and stakeholders have already been identified and given the opportunity to provide input. The final bill also will create efficiencies and is expected to produce meaningful cost savings.

V. Appointment of a Nominating Committee

Chair Hanan elected to delay her appointment of a nominating committee for another week to allow members additional time to consider whether they are interested in serving on the committee and/or serving in a leadership role.

VI. Discussion and/or Action Regarding Length of Supreme Court Petitions for Review

Chair Hanan tabled further discussion on this item until the June 17th meeting.

VII. Committee Reports

A. Appellate Procedure

Chair Hanan reported that the Appellate Procedure Committee met on May 10th via conference call. Several of the drafters that serve on the PPAC limited scope representation subcommittee participated in the meeting. The PPAC subcommittee would like a recommendation from the Council on limited scope representation in the appellate context, and

specifically whether the limited representation should be disclosed to the court and whether the lawyer should be identified. The committee has not been asked to draft any proposed rules at this time. The committee is on track to submit its recommendation to the full Council at the June 17th meeting.

Committee Co-Chair Stephens reported that the committee will meet later today to review the portions of the presentence investigation project that were referred back to the committee for redrafting. The committee expects to have a revised draft ready for submission to the full Council by its June 17th meeting.

B. Criminal Procedure

Since the criminal procedure amendments were discussed earlier in the meeting, Vice Chair Schultz had no further report.

C. Evidence and Civil Procedure

Council member Leineweber reported that the Evidence & Civil Procedure Committee will continue to discuss Wis. Stat. § 906.09, and will begin to discuss the hearsay definition at its meeting later today. He noted that the committee is nearing the end of its work plan. Council member St. John requested additional information regarding the issues related to s. 906.09. Council member Leineweber explained that the committee received some empirical data from a study suggesting that defendants (who ultimately are found innocent) with prior convictions are considerably less likely to take the stand in their own defense.

The committee also is preparing a list of potentially interested parties to solicit comments on the draft proposal to amend Wis. Stat. §§ 804.01 and 905.03 regarding inadvertent disclosure and privilege waiver.

Several current and former committee members spoke on e-discovery and the duty to preserve/spoliation of evidence at the State Bar's Litigation, Appellate and Alternative Dispute Resolution Institute on May 5th.

VIII. Other Business

A. Supreme Court Advisory Committee on Rules Petitions Procedure Report

Chair Hanan reported that the Supreme Court Advisory Committee is currently finalizing a draft and anticipates submitting its report to the court by May 26th. The report discusses the current procedure for rule change petitions and describes several alternatives for the court's consideration, including slight modifications to the current form, and the creation of a judicial policy council or rules advisory board. The committee also considered additional screening of petitions prior to review by the court and the provision of guidelines and templates. The committee discussed dissemination of information to the public, and a modification has been made to the court's web site to provide additional information regarding pending petitions, archived petitions, and petition templates.

B. PPAC Liaison's Report

Chair Hanan tabled the PPAC report.

C. Council Attorney's Report

1. June Recognition Meeting

Attorney Southwick announced that the Council's annual alumni and volunteer recognition meeting is scheduled for June 17th in the Assembly Parlor. Since this is a budget year, there is a possibility that the Assembly Chambers could be in use, so the North Hearing Room has been reserved as an alternative location. Chair Hanan asked members to encourage Council alumni to attend the event.

IX. Adjournment

The Council adjourned at 11:25 a.m.