

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
June 17, 2011

The Judicial Council met at 9:30 a.m. in the Assembly Parlor, Second Floor West, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Vice Chair Professor David E. Schultz, Thomas W. Bertz, Honorable Patricia S. Curley, Allan M. Foeckler, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, Rebecca St. John, Honorable Mary K. Wagner, Honorable Maxine A. White, Nicholas C. Zales.

MEMBERS EXCUSED: Chair Beth E. Hanan, Michael R. Christopher, A. John Voelker, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Theresa Owens, Office of the Chief Justice, Michelle Cern, Supreme Court Policy Analyst.

I. Call to Order and Roll Call

Vice Chair Schultz began the volunteer recognition portion of the meeting at 9:50 a.m. Plaques were presented to out-going Council members. All guests were introduced and asked to make a few remarks. Visiting alumni commented on their years of service on the Council.

The business portion of the meeting was called to order at 10:20 a.m.

II. Approval of May 20, 2011 Minutes

MOTION: Council member Bertz moved, seconded by Council member Roggensack, to approve the May 20, 2011 meeting minutes. Minutes were approved unanimously without amendment.

III. Approval of 2011-2012 Meeting Dates

The following 2011-2012 meeting dates were proposed:

Friday, September 16, 2011
Friday, October 21 2011
Friday, November 18, 2011
Friday, December 16, 2011
Friday, January 20, 2012
Friday, February 17, 2012
Friday, March 16, 2012
Friday, April 20, 2012

Friday, May 18, 2012
Friday, June 15, 2012

The proposed meeting dates are all on the third Friday of each month. The meetings will generally continue to take place at the State Capitol, Madison, although the Council will discuss holding a meeting at the University of Wisconsin--Milwaukee in the fall. Council member Roggensack suggested that the meeting should occur when classes are in session so that students have an opportunity to attend.

MOTION: Council member Foeckler moved, seconded by Council member La Fleur, to approve the meeting dates as proposed. Motion approved unanimously.

IV. Election of 2011-2012 Chair and Vice Chair

Chair Hanan previously appointed Vice Chair Schultz and Council members Shriner and Foeckler to serve on the nominating committee. Council member Shriner reported that the committee nominated Tom Bertz to serve as chair and Rebecca St. John to serve as vice-chair of the Council for the 2011-2012 Council year. There were no additional nominations from the floor.

ACTION: The recommendation of the nominating committee was approved unanimously.

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

The Council reviewed a revised draft of proposed amendments to the statutes regarding presentence investigation (PSI) reports, dated June 8, 2011. Council member Stephens noted that Attorney Southwick made the revisions that were specifically directed by the Council, and focused the discussion on the amendments that were redrafted by the committee in response to previous Council discussions.

Council member Stephens explained that the committee revised s. 972.15 (2), the process for reviewing, objecting, and acting on objections to PSI reports. The Council previously agreed that the PSI report should be provided in advance of sentencing to permit timely review by the defendant and the defendant's attorney, and that objections to the report's content should be made in advance of the sentencing hearing. Par. (a) requires that a copy of the report must be given to the attorneys and the defendant at least seven days prior to the sentencing hearing. Par. (b) requires that the defense attorney must review the report with the defendant. Par. (c) requires that objections to the content of the report must be made in writing at least two days prior to the hearing. Par. (d) allows, but does not require, the report writer to amend the report in response to the objection(s). Par. (e) sets forth the process for the court to address the objections, and requires that the court rule on each objection prior to sentencing. Par. (f) and (g) were not modified from the previous draft. Par. (h) was modified to allow a reduction or an extension of the time limits.

Council member Roggensack suggested that with regard to par. (a), a copy of the report should only be made available to unrepresented defendants because represented defendants can review the report with their attorney. Council member Roggensack expressed concern with providing a document to a represented defendant prior to defense counsel having an opportunity to review it. Council member Stephens explained that the Appellate Procedure Committee determined that for the defendant to provide a meaningful response to the report content, the defendant needs to be given an opportunity to read the report and think about it prior to meeting with defense counsel. Additionally, the committee believes that it is a waste of resources to require the defense attorney to sit there while the defendant reads the report, which can be twenty or more pages in length.

Council member Roggensack expressed additional concern with the lack of specific procedures for complying with par. (a). Council member Stephens explained that the accompanying note provides some suggested procedures for making the report available to defendants, but the committee intentionally avoided incorporating strict requirements in the statute because the process will likely vary from county to county. She added that the proposal is based on the federal rules. She also noted that the Council continues to monitor the rules that it drafts so if a rule does not appear to be working in practice, an amendment can be proposed to address the problem. Council member Wagner spoke in favor of the flexibility provided by the proposal.

Council member White expressed concern that defense attorneys may not have sufficient time to review the report, meet with the defendant (especially if the defendant is in jail), and file written objections to the report within seven days. Council member Stephens stated that paying an attorney to sit at the jail and watch a client read a report is not a good use of resources. It would be more efficient to allow the defendant to read the report prior to meeting with defense counsel. Council member Stephens also expressed concern that time constraints may cause defense counsel to make a photocopy of the report and leave it with the defendant, which conflicts with the drafting committee's goal of preventing defendants from retaining copies of reports in their possession.

MOTION: Council member Shriner moved, seconded by Council member La Fleur, to modify proposed s. 972.15 (2) (a) to require that only unrepresented defendants receive a copy of the PSI report. Council member Wagner asked that the motion be amended to clarify that a copy will be made available for review by unrepresented defendants, but they will not receive their own copy. The friendly amendment was accepted. Council member Leineweber suggested that the amendment does not resolve the concern that some defense attorneys are not taking the proper amount of time to review the report, and are not providing their clients with sufficient time to review it. Will this provision, as further amended, provide defendants with a meaningful opportunity to review the report prior to the sentencing hearing? Council member Ptacek suggested that judicial education can also be used to inform judges of the importance of ensuring that the defendant receives a meaningful opportunity to review the report. Council member White suggested that the proposal is an improvement over the current process, which contains no requirements to allow the defendant or defense counsel a set length of time to review the report in advance of the sentencing hearing. Motion to amend s. 972.15 (2) (a) to read, "and shall make

a copy available to any unrepresented defendant to review personally" approved, with Council members Stephens and Leineweber opposed. Council members Ott and Roggensack abstained.

Council member Zales noted that some paragraphs in s. 972.15 (2) refer to "days" while others state "calendar days." Council member Stephens believed that was inadvertent. The committee will revisit it to ensure consistency.

Council member Stephens explained that s. 972.15 (2a) (d), factual basis for finding of guilt, was amended consistent with the Council's previous discussion. She added that the working note was also amended at the suggestion of the department of corrections (DOC) representative who thought it would be helpful to the DOC staff to quote from their manual because this change is based on the language in the DOC manual and codifies DOC's current procedure.

MOTION: Council member Ptacek moved, seconded by Council member Zales, to approve the amendment to s. 972.15 (2a) (d). Motion approved unanimously with Council members Ott and Roggensack abstaining.

Council member Stephens explained that s. 972.15 (4m), retention of presentence investigation materials by counsel, was further amended to allow successor counsel to obtain a copy of the PSI material from the clerk of court without a court order.

MOTION: Council member Leineweber moved, seconded by Council member Wagner, to approve the amendment to s. 972.15 (4m). Motion approved unanimously with Council members Ott and Roggensack abstaining.

Vice Chair Schultz noted that s. 972.15 (4) (a) references the prosecutor, while other provisions refer to the district attorney. Council member Roggensack inquired as to cases in which the department of justice is handling the prosecution. Vice Chair Schultz stated that the proposed criminal procedure amendments drafted by the Criminal Procedure Committee use and define "district attorney" to include all types of prosecutors. Council member Stephens explained that "district attorney" is not defined under current law, so the use of prosecutor is appropriate in par. (4) (a). Council members agreed that a more general term, such as "prosecutor," is appropriate in this instance. Council member Stephens suggested that the legislative reference bureau (LRB) can also provide advice on the proper terminology.

Council member Stephens explained that s. 972.15 (4p), access to presentence investigation materials by defendant after sentencing, was amended to apply more broadly to everyone in custody or control of the department on or after the effective date.

MOTION: Council member Shriner moved, seconded by Council member La Fleur, to approve the amendment to s. 972.15 (4p) working note and the non-statutory initial applicability provision.

Council member Roggensack asked for further discussion on several sections prior to a vote. She questioned the need for a provision to allow a motion to exclude the PSI material from

the appellate record (s. 809.15 (1) (am) 2.). Council member Stephens explained that if sentencing is not at issue in the appeal, it may be appropriate to remove the PSI material from the record. Council member Wagner noted that the state may also wish to file a motion on behalf of the victim to exclude the material in cases where the victim's statement contains sensitive information. Council member Stephens explained that the practice is currently inconsistent and in some jurisdictions it is difficult to get the material included in the record, so having inclusion of the PSI material in the record as the default is an improvement. However, the committee recognized that in some cases, counsel may have strategic reasons for limiting the record on appeal (for example, to focus the issue).

Council member Roggensack also questioned whether the PSI report writer is capable of making a recommendation regarding sentence credit (s. 972.15 (2a) (f)), due to the complexity of the law. Council members Wagner, White, Ptacek and Leineweber favored inclusion of this provision, and stated that it would be helpful to the trial court to receive the information and the report writer's opinion. Attorney Southwick noted that the department of corrections did not object to this provision. Council member Stephens stated that this provision was amended at the request of the department of justice. The department of justice expressed frustration over the number of appeals involving sentence credit, and requested that factual information about sentence credit be included in the PSI report.

Council member St. John suggested that the initial applicability provision should be amended so that the proposed rules apply to all subjects of PSI reports, regardless of date of custody or control, for ease of application and fairness. Vice Chair Schultz suggested that this provision actually serves to pull people in who were not sentenced under these provisions and ensures that a broader group of defendants must comply with the confidentiality provisions. Council member Stephens suggested that the Council postpone a vote on the initial applicability provision, and the Council agreed to seek further guidance from LRB regarding this provision.

MOTION: Council member Bertz moved, seconded by Council member Wagner to approve the draft, dated June 8, 2011, as amended. Motion approved unanimously with Council members Ott and Roggensack abstaining.

VI. Discussion Regarding Recommendations from the Appellate Procedure Committee Regarding Procedural Concerns with Limited Scope Representation and Ghostwriting of Legal Documents

Vice Chair Schultz stated that the Appellate Procedure Committee was asked to make recommendations regarding limited scope representation and ghostwriting at the appellate level, and convey those recommendations to the PPAC subcommittee that is studying the issue. Attorney Southwick added that the recommendations were ultimately more general in scope to avoid having separate procedural rules applicable at the circuit court and appellate court levels.

The committee presented a recommendation to the full Council and requested authorization to convey its recommendation to the PPAC limited scope representation subcommittee. Attorney Southwick explained that the PPAC subcommittee will report their recommendations to PPAC in August. PPAC is then expected to provide further guidance to the

subcommittee, which could include a request to draft proposed rules. Council member Shriner asked whether a State Bar committee is also studying this issue. Attorney Southwick stated that she contacted the State Bar, and confirmed that they do not currently have a committee working on this issue.

Council member Shriner opposed conveying any recommendations to the PPAC subcommittee until the full Council has also had an opportunity to study the issue of limited scope representation. He was troubled by the implication that it could be viewed as advocacy by some people for lawyers to use limited scope representation as a way to keep busy during hard economic times by doing a partial job for clients without accountability. He also expressed concern that the practice has the potential for misleading courts. Council member White also opposed conveying a recommendation because the full Council has not had an opportunity to study the issue in depth. The Council also discussed whether this is really a study of ethics rules, an area in which the Council has not traditionally been involved.

Vice Chair Schultz asked whether the PPAC subcommittee is working within a certain time frame. Attorney Southwick stated that the subcommittee is planning to convey their final report to PPAC by August. PPAC will then study the recommendations of the subcommittee and decide whether to proceed. Council member Leineweber proposed that the Council extend an offer to PPAC that the Council is willing to study the issue further when it resumes meeting in the fall, if PPAC is willing to delay its own action. The Council agreed to revisit the issue at the September meeting. PPAC subcommittee staff members Theresa Owens and Michelle Cern were present and will convey the Council's position and offer to provide further assistance to the PPAC subcommittee.

VII. Discussion and/or Action Regarding Budget and Staffing

Vice Chair Schultz provided a brief summary regarding the Council's 2011-2013 budget. Council member Ott offered to assist the Council with legislation to create a budget line for the receipt of gifts and grants. Attorney Southwick distributed a document prepared by the Legislative Fiscal Bureau comparing the Council's budget as proposed in the Governor's budget bill versus the final approved budget after amendment. Council member Leineweber extended his appreciation to everyone who worked to secure support for the Council's funding. In particular, he recognized the efforts of Chair Hanan. He noted that the Council would continue its work regardless of funding level, but retention of the staff position certainly allows the Council to work more efficiently, and allows it to complete its projects in a timely manner.

VIII. Committee Reports

A. Appellate Procedure

There was no report.

B. Criminal Procedure

There was no report.

C. Evidence and Civil Procedure

Council member Leineweber reported that the Evidence & Civil Procedure Committee will continue to discuss Wis. Stat. § 906.09, impeachment by prior conviction, and will begin to discuss the hearsay definition at its meeting later today. He announced that Professor Keith Findley, Wisconsin Innocence Project, and Roy Korte, Department of Justice, will be attending the meeting today as special guests to share their thoughts on the use of evidence of prior convictions for impeachment purposes.

IX. Other Business

A. Supreme Court Advisory Committee on Rules Petitions Procedure Report

There was no report.

B. PPAC Liaison's Report

There was no report.

C. Council Attorney's Report

There was no report

X. Adjournment

The Council adjourned at 12:15 p.m.