

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 21, 2011

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Rebecca R. St. John, Christine Rew Barden, William Gleisner, Catherine A. La Fleur, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Cathlene Hanaman, Honorable Edward E. Leineweber, Representative Jim Ott, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Theresa Owens, Office of the Chief Justice.

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:45 a.m. and introduced new Council member Barden.

II. Approval of September 16, 2011 Minutes

MOTION: Council member Stephens moved, seconded by Council member Ptacek, to approve the September 16, 2011 meeting minutes. Minutes were approved unanimously with two minor typographical errors noted.

III. Discussion and/or Action Regarding Recommendation from the Evidence & Civil Procedure Committee Regarding Wis. Stat. § 805.07, Subpoenas

Attorney Southwick stated that in March 2011, the Judicial Council approved proposed amendments to address inadvertent disclosure and lawyer-client privilege (Wis. Stats. §§ 804.01 and 905.03). The amendments were studied and drafted by the Evidence & Civil Procedure Committee as a follow-up to its previously adopted rules for the discovery of electronically stored information that went into effect in January.

Over the summer, the committee circulated a copy of the proposed amendments to ss. 804.01 and 905.03 to a number of organizations and interested parties and asked for comments and feedback. The committee received a suggestion that the proposal ought to address inadvertently disclosed documents produced pursuant to a subpoena. After study and discussion, the committee agreed that a clawback provision should also be included in Wis. Stat. § 805.07, subpoena.

The proposed amendment to s. 805.07 is consistent with the language found in the proposed amendment to s. 804.01 (7), recovering information inadvertently disclosed, previously approved by the Judicial Council. Council member Shriner added that the recommended amendment to s. 805.07 is also consistent with an amendment to the federal rule regarding subpoenas (FRCP 45) that was approved several years ago as part of the e-discovery amendments to the federal rules.

MOTION: Council member Stephens moved, seconded by Council member Gleisner to approve the proposed amendment to Wis. Stat. § 805.07 to add a new sub. (d) to address clawback, as proposed in Attorney Southwick's memorandum dated September 27, 2011. Motion approved unanimously with Council member Roggensack abstaining.

Attorney Southwick reported that she has prepared a draft rule change petition to amend ss. 804.01, 805.07 and 905.03, and has begun writing the supporting memorandum. She hopes to have a draft ready for Council review by the November meeting.

IV. Discussion/Action Regarding Proposed Amendments to the Rules of Criminal Procedure

Council member Schultz noted that the Council agreed to begin its review of the criminal procedure draft bill by discussing the major policy changes incorporated in the draft. A memo from Council member Schultz and Attorney Southwick was circulated to members in advance of the meeting to direct members to several policy changes within the draft. The memo also provides background and procedural history regarding an additional policy item that could be added to the draft to address plea withdrawals.

Council member Shriner inquired as to whether any consideration has been given to the Wisconsin Supreme Court's adoption of the rules of criminal procedure, as opposed to legislatively adopted rules, similar to the federal process. Council member Schultz did not recall any specific discussion regarding following the federal system for adoption of the criminal procedure rules, and he noted that the previous comprehensive amendment to the criminal procedure rules was approved by the legislature. He added that the supreme court has previously considered certain criminal procedure rule, including an amendment to the rules regarding plea withdrawals. Council member Stephens noted that many criminal procedure rules have been adopted by the supreme court pursuant to the court's rule making authority, and she expressed her support for the judicial branch exerting more control over the procedures that effect the courts. She added that a comprehensive amendment does seem more appropriate for legislative approval because several pieces are arguably substantive and it is more efficient to propose the changes as one packaged amendment instead of introducing it piecemeal. Council member Roggensack explained that the supreme court's rule making authority is limited, and does not extend to rules that effect any person's substantive rights. Many criminal procedure rules have a substantive component.

A. Encourage Prompt Disposition of Misdemeanors

Council member Schultz explained that for each provision outlined in the memo, approval by the full Council would constitute both approval of the general policy, as well as approval of the specific statutory provisions listed in the memorandum. Council member Stephens noted that two additional sections should be included in the discussion. Sec. 971.015 allows access to discovery prior to initial appearance, and the draft provides a form for the misdemeanor citation.

Council member Roggensack inquired as to whether the committee considered how the use of the citation as the complaint will fit with the move toward e-filing. Council member Ptacek explained that many police departments and the State Patrol already issue electronic citations so it should not be an issue.

Council member Schultz explained that there is a general perception that misdemeanors take too long to process under the current statutes. In an early attempt to address the concern, the statutes were amended to allow the citation to be used in place of arrest and formal complaint. However, the process is not used consistently. The proposed amendments are intended to expand on the concept and encourage its use, including release without a court appearance. However, domestic violence cases are excluded from this process.

Council member Ptacek inquired as to whether the amendment enhances the form of the citation, because currently citations generally do not contain information such as the penalty. Council member Schultz responded in the affirmative and noted that s. 969.26 (3) contains a recommended form for the citation. It includes information regarding the maximum penalty and the facts believed to constitute the violation. Members noted that the district attorney ultimately endorses the use of the citation so there is a review process. If the citation is found to be insufficient, a criminal complaint would be drafted by the district attorney.

Council member Roggensack inquired as to whether there is any recourse with regard to an officer's refusal to release. Council member Schultz explained that the provisions use the term may and the decision to release is discretionary. An officer can require release by a judge if the officer determines that is appropriate in a given situation.

MOTION: Council member Stephens moved, seconded by Council member Ptacek to approve the provisions proposed to encourage prompt disposition of misdemeanors. Motion approved unanimously with Council member Roggensack abstaining.

B. Eliminate Preliminary Examinations in Felony Cases

Council member Schultz explained that this provision repeals Wis. Stat. § 970.03 and instead, encourages earlier and more complete discovery. Vice Chair St. John inquired as to whether there is an escape valve in the event that a police report can not be released by the initial appearance (i.e. confidential informant or other sensitive information). Council member Schultz responded in the affirmative and explained that s. 971.035 provides that material in the district attorney's possession shall be disclosed. The provisions also provide for delays for good cause shown.

Council member Schultz explained that the proposal adds a provision for pretrial dismissal of a complaint in cases where facts, even if taken as true, still don't rise to the crime charged. He likened the process to a civil summary judgment. Council member Ptacek asked if there was a model on which this new provision is based. Council member Schultz explained that it is based on a provision in the Uniform Rules of Criminal Procedure as adopted by the Uniform Commission on State Laws, and it is also consistent with the ABA model standard.

Council members discussed the fact that many other states have eliminated preliminary examinations. Council member Stephens noted that the committee recognized this fact, but still spent a considerable amount of time discussing the elimination of the hearing. She added that while judges tended to favor elimination of the hearing, many practitioners were concerned about the change. She reminded the Council that the proposed draft bill is a consensus document, and a lot of time was spent at many different stages of the draft to craft provisions to alleviate some of the concerns of practitioners surrounding the loss of the preliminary hearing. For example, the provisions allowing for earlier discovery will help counsel determine the strength of the case and allow earlier investigation of the witnesses and the evidence.

MOTION: Council member Wagner moved, seconded by Council member St. John to approve the elimination of preliminary examinations in felony cases and approve the provisions to encourage earlier and more complete discovery and allow a motion for pretrial dismissal of a complaint. Motion approved unanimously with Council member Roggensack abstaining.

C. Plea Withdrawal

Council member Schultz provided some history on this issue, including information regarding the Council's previous attempt to amend the statutes regarding plea withdrawal, and a PPAC subcommittee study on the subject. The PPAC subcommittee followed up on its study by requesting that the court of appeals maintain some statistics. Chief Judge Brown provided the requested statistics and they were recently forwarded to the Council.

Council member Wagner inquired as to the point in the process when the judge would need to determine that he or she is not going to follow the negotiated sentencing recommendation. She also asked whether the timing for the completion of the presentence investigation report would need to be changed since judges consider it when making decisions regarding sentencing. Council member Schultz noted that those are some of the issues that prevented the Criminal Procedure Committee from making a recommendation to be included in the draft bill. However, some new information has recently been provided to the Council, so the issue should be re-evaluated.

Council member Shriner opposed the project and expressed concern that incorporating this provision into the draft bill could increase the likelihood of the project being delayed or rejected. Council member Stephens noted that a plea withdrawal project could be taken up separately, instead of including it with the criminal procedure draft bill.

The statistics received from the court of appeals indicate that a significant number of appeals involve cases in which the sentence exceeded the recommendation. Allowing plea

withdrawals if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement could reduce the number of appeals. In addition to potentially reducing the number of appeals, Council member Stephens suggested that there could be other costs and savings to the system. For example, allowing plea withdrawals could reduce the number of no-merit reports, but she suggested that it could also increase the number of trials. These are issues that the committee should study prior to making any recommendations.

Council members White and Ptacek both raised a question regarding cases in which the judge is going to issue a sentence that is less harsh than the one agreed to by the defendant. Judge White also expressed concern that this proposal will require that information about the defendant and the defendant's history be available to the court at the time the plea is accepted.

MOTION: Council member Shriner moved, seconded by Council member Gleisner to refer the project to the Criminal Procedure Committee for further study and a recommendation, but specifically declined to approve this issue for inclusion in the criminal procedure draft bill. Council member Roggensack spoke in opposition to referring the issue to the committee. Council member Stephens added that the PPAC subcommittee also learned that some judges are already allowing plea withdrawals so the practice is currently not consistent in the circuit courts. Council member White suggested a friendly amendment to split the motion into two separate motions. The amendment was accepted. Motion in opposition to inclusion of this issue in the criminal procedure draft bill approved unanimously with Council member Roggensack abstaining.

MOTION: Council member Shriner moved, seconded by Council member Wagner to refer the project to the Criminal Procedure Committee for further study and a recommendation. Motion approved unanimously with Council member Roggensack abstaining.

V. Discussion/Action Regarding Potential New Judicial Council Projects

Prior to the meeting, Attorney Southwick distributed a memorandum providing additional information on four potential new Judicial Council projects. The project requests came to the Council following review and recommendation from the Executive Committee.

A. Procedural rules for prisoner challenges to agency decisions

Council members agreed that creating clear procedural rules that are easy to locate would be an excellent project for the Judicial Council. Council member Stephens suggested that the project be referred to the Appellate Procedure Committee.

MOTION: Council member Shriner moved, seconded by Council member Wagner to refer the project to the Appellate Procedure Committee for study and a recommendation. Motion approved unanimously with Council member Roggensack abstaining.

B. Rule 809.15, to promote consistency and completeness of the record on appeal

Council members discussed some of the problems practitioners and courts encounter under the current rule. Council member Shriner noted that the rule is also applicable to civil appeals, and he suggested that if a committee studies this issue further, the committee should not focus solely on problems that arise in criminal matters. He suggested that interpretation of the rule by court clerks can vary by county, so providing additional direction in the rule would be helpful.

MOTION: Council member Stephens moved, seconded by Council member Wagner to refer the project to the Appellate Procedure Committee for study and a recommendation. Motion approved unanimously with Council member Roggensack abstaining.

C. Precedential value of overruled court of appeals' decisions

Council member Gleisner spoke in favor of the Council studying this issue. He suggested that *Blum v. 1st Auto & Casualty Ins. Co.*, 2010 WI 78 takes a very different direction from other jurisdictions, including the federal courts. He suggested that it undermines *stare decisis* in Wisconsin in several ways. Unpublished decisions are already outside the realm of precedent, and the *Blum* opinion removes even more appellate opinions from the already small body of authority. He strongly favored referring this matter to a committee for further study of how this matter has been addressed in other states, as well as the federal courts. Council member Gleisner volunteered to assist with the study.

Council member Shriner spoke in opposition to studying this matter further because the *Blum* case was decided very recently. There's no indication that a majority of the court would be inclined to disturb the opinion. He also questioned whether this issue is even appropriate for a rule.

Council member Roggensack explained that her dissent in *Blum* reflects the fact that the question of the precedential value of an overruled court of appeals decision was not an issue that the parties brought to the court. The court requested that the parties address the issue, but it was only briefed in one or two paragraphs. The court was not presented with statistics or any studies prior to issuing the opinion.

Council member Stephens noted that the *Blum* case leaves many questions unanswered regarding various types of decisions. She observed that overruled and reversed are not the same, so a comprehensive study and recommendation may be helpful to the court. Council member Gleisner suggested that *Blum* also does not address persuasive value.

Council member Barden asked whether this issue could involve substantive rights which may require legislative action. Members generally agreed that it would be appropriate to conduct the study before attempting to make that determination.

MOTION: Council member Gleisner moved, seconded by Council member Barden to refer the issue to the Appellate Procedure Committee for comprehensive study. Motion approved with Council members White, Shriner, and Schultz opposed, and Council member Roggensack abstaining.

D. Rule 809.19, protecting the identity of victims

Council member Stephens explained that there is currently no rule or statute addressing how victims and witnesses should be identified in criminal cases on appeal. There is limited guidance requiring the use of first name and last initial in confidential proceedings. Agencies and some courts have adopted internal guidelines, but there is no comprehensive rule. Her concern regarding the privacy of victims and witnesses has intensified now that briefs are posted on the internet. Both Council member Stephens and Vice Chair St. John support the adoption of a rule regarding identification of victims and witnesses during the appellate process. Council member Roggensack stated her support for this project, and agreed that there is no uniform policy within the court system.

MOTION: Council member Shriner moved, seconded by Vice Chair St. John to refer the project to the Appellate Procedure Committee for study and a recommendation. Motion approved unanimously with Council member Roggensack abstaining.

VI. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the committee did not meet last month, but will meet later today to begin discussing the new projects that have been referred to the committee.

B. Criminal Procedure

Committee Chair Schultz had no further report.

C. Evidence and Civil Procedure

Attorney Southwick reported that the Evidence & Civil Procedure Committee met last month and continued to discuss a possible amendment to Wis. Stat. § 906.09, impeachment by prior conviction. No resolution was reached and a new draft will be discussed when the committee meets later today. The committee will also continue to study possible amendments to the hearsay definition.

VII. Other Business

A. PPAC Liaison's Report

There was no PPAC report.

B. Council Attorney's Report

At its most recent administrative conference, the supreme court discussed the report from the rules advisory committee regarding potential changes to the rules petition process. The court

ordered the matter set for public hearing and expressed a desire to obtain testimony from a federal judge and/or court clerk experienced with the federal rules advisory committee process. Council member Shriner recommended Hon. Gene Wedoff, a bankruptcy judge from the Northern District of Illinois.

Attorney Southwick reported that the State Capitol has no available meeting rooms for the Council's November 18th meeting, so the Council will meet in Lubar Commons at the University of Wisconsin Law School. She will send a map and parking information with next month's Council materials.

Council member Stephens asked for an update regarding the current vacancies on the Council. Attorney Southwick reported that the Council is still awaiting the Governor's appointment of a district attorney and the position is currently vacant. There are also two additional positions with expired terms that are awaiting appointments by the Governor, although the current members will continue to serve until replaced or reappointed. Finally, the Judicial Conference has nominated Oneida Circuit Court Judge Mangerson to replace Judge Leineweber who retired over the summer. She anticipates that Judge Mangerson will be elected to the Council at the Judicial Conference business meeting on November 3rd.

VIII. Adjournment

The Council adjourned at 11:35 a.m.