

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 17, 2010

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 Patricia S. Curley, Allan M. Foeckler, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, Senator Lena Taylor, Honorable Mary K. Wagner, Greg Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: James M. Brennan, Michael R. Christopher, A. John Voelker.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Margaret Porco, State Bar of Wisconsin; Kate Battiato, Office of Representative Hebl; and Eric Peterson, Office of Senator Lena Taylor; Joe Ehmann, State Public Defender's Office; Peg Carlson, Court of Appeals Chief Staff Attorney; Professor Meredith Ross, University of Wisconsin.

I. Call to Order and Roll Call

Chair Hanan called the meeting to order at 9:40 a.m. Council members introduced themselves.

II. Approval of June 18, 2010 Minutes

MOTION: Council member Hebl moved, seconded by Council member Bertz, to approve the June 18, 2010 minutes. Motion approved unanimously.

III. Approval of 2011-13 Biennium Budget

Attorney Southwick reported that overall, the Council's 2011-13 biennium budget request is a *status quo* budget, with two exceptions. One of the standard items is increasing an appropriation for anticipated increase in rent for the new biennium. For the Judicial Council, this amounts to \$300/year under the Council's current office space lease. The only other increase in the Council's budget is the full funding for salary and fringe benefits. With the standard increases, the Council's budget increases 7.21%. The Council's budget analyst submitted the Judicial Council's 2011-2013 budget request to the Executive Budget Office on Wednesday, September 15th. Copies of the budget were distributed to all members prior to the meeting. This item is on the agenda for approval.

Attorney Southwick added that the state is implementing a new computer program for the budget, and the DOA budget staff is aware of interim difficulties in correctly generating reports. Nonetheless, the bottom line numbers submitted for Council approval of the budget and adjustments are correct.

Council member Roggensack asked about the method used to calculate fringe benefit increases. Attorney Southwick explained that according to our DOA budget analyst, these numbers were derived by using a standard formula. The formulas were used to calculate the adjustments for all agencies, so the Judicial Council increases should be consist with budget increases requested by other agencies.

MOTION: Council member Hebl moved, seconded by Council member Stephens, to approve the 2011-13 biennium budget request as presented. Motion approved unanimously, with Council member Roggensack abstaining.

IV. Discussion and/or Action Regarding Requests for Input on the Following Supreme Court Rule Change Petitions:

- A. Amendments to SCR 40.03 Regarding Diploma Privilege (Petition No. 09-09)**
- B. Amendments to SCR 22.24 Relating to Cost Assessments in the Lawyer Regulation System (Petition No. 05-01)**
- C. Amendments to SCR 12.02 and 12.03 Relating to the Lawyers Assistance Corporation (Petition No. 10-07)**
- D. Establishment of Standards and Procedures for Permanent Revocation of License to Practice Law (Petition No. 10-04)**
- E. Amendments to SCR 81 Relating to Compensation to Court-appointed Attorneys (Petition No. 10-03)**

Chair Hanan moved this item to the end of the agenda. (Later in the meeting, Chair Hanan determined that there was insufficient time to address this item. These are routine requests sent by the court and will be rescheduled to next month's agenda.)

V. Discussion and/or Action Regarding Criminal Procedure Amendments

- A. Police Searches Using GPS (*State v. Sveum*, 2010 WI 92)**

Vice Chair Schultz explained that a recent decision of the Wisconsin Supreme Court (*State v. Sveum*) involved tracking a suspect's activities by attaching a GPS device to his car, pursuant to a court order. In the opinion, several justices suggested the need for legislation to establish procedures for issuing a warrant, executing that warrant, and other procedural concerns related to police searches using GPS. He stated that it would be logical to add this provision to the criminal procedure bill currently being drafted. He also stated that there is a comparable federal rule that would be a good starting point in drafting a Wisconsin rule. He concluded that if the Judicial Council accepts the project, the Criminal Procedure Committee is willing to take it on either as part of the comprehensive amendments, or as a separate project.

Chair Hanan explained for new Council members that the Council's charge is to study and review rules of pleading, practice and procedure. The Council receives requests from all three branches of government, as well as individuals. When a request is received, it is presented to the full Council for a determination regarding whether Council resources should be expended to undertake the project. If so, the Council decides whether it will work on it as a whole, or whether it will be referred to one of the standing committees or a specially appointed committee.

She noted that if the Council refers this project to the Criminal Procedure Committee, it should also consider whether the GPS project should be incorporated into the on-going criminal procedure bill, or whether it should be considered as a separate project.

Council member Weber added that the supreme court left undecided the issue of whether the use of a GPS device implicates the Fourth Amendment. Courts are deeply divided on this issue. The Wisconsin Department of Justice takes the position that the Fourth Amendment is not implicated, and filed an *amicus curiae* brief in the *Sveum* case. Council member Weber will provide a copy to Attorney Southwick. The Department of Justice also has a standing committee that is discussing this issue in the context of best law enforcement practices. The committee will prepare a proposal to introduce in the legislature.

Council member Wagner stated that GPS issues also can arise when an individual is tracked via his or her cell phone. Council member Stephens agreed that this issue can have very broad implications and with emerging technology, it could potentially impact many people. She suggested that input on regulations should be as broad as possible, and a Judicial Council committee is capable of receiving input from a wide variety of stakeholders.

Council member Taylor provided some legislative history on GPS tracking. Assembly Bill 171 was previously introduced to regulate GPS tracking by private parties. Her office distributed a copy of the bill. She believes there will be another attempt to introduce this legislation in the next session.

Council member Hebl added that given the decline in the number of attorneys serving in the Assembly, he believes Judicial Council involvement has become even more important and serves to enhance the quality of legislation, especially in the context of legislation that can potentially have a significant impact on constitutional rights.

The Council agreed by consensus to refer this issue to the Criminal Procedure Committee to do the following: 1) determine whether potential procedural recommendations are best handled after the pending bill draft is completed or whether it should be included in the comprehensive amendment; 2) study the issue; and 3) prepare a proposal.

VI. Discussion and/or Action Regarding Rules for the Discovery of Electronically Stored Information (No. 09-01)

Council member Leineweber reminded Council members that the rules proposed by the Judicial Council regarding the discovery of electronically stored information are the topic of another supreme court public hearing on September 30th. He asked for Council feedback regarding the role the Council should play at the hearing.

Attorney Southwick provided some history for the Council's new members. She explained that the Council proposed rules, which were adopted by the supreme court in July. The new rules will be effective January 1. The court asked for additional written comments by August 31, and set another public hearing for September 30th. No written comments were received. The court extended the deadline for written comments from circuit court judges until

September 22. At this time, no substantive comments have been received. At the Council's June meeting, it asked the Evidence & Civil Procedure Committee to consider the Council's continuing role at the upcoming public hearing. The committee met several times over the summer and in light of the fact that no further written comments have been received, the committee recommends that the Council have a number of members in attendance at the public hearing to respond to potential comments or questions, although none are expected. The committee feels that the Council's position has already been adequately presented to the court, and does not feel additional testimony is needed at this time. Five members of the Evidence & Civil Procedure Committee have volunteered to attend the hearing.

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

Prior to the meeting, council members received a memorandum from Council member Stephens, Chair of the Appellate Procedure Committee, as well as proposed draft amendments to the rules regarding presentence investigation (PSI) reports. Council member Stephens introduced several members of the Appellate Procedure Committee, including Joe Ehmann, Meredith Ross and Peg Carlson.

Council member Stephens introduced the PSI proposal by leading a discussion that followed her previously distributed memo, dated September 14, 2010. She explained the history of the PSI project and summarized the various individuals and entities that participated in drafting and provided input. She explained the general content of a PSI report, as well as how it is generally used by the court and DOC. She also summarized the areas of the proposal where consensus was not achieved.

Council members discussed the frequency with which PSI reports are ordered by the court. The circuit court judges on the Council generally indicated that PSI reports are ordered in most felony cases. Council member Stephens clarified that the reports that will be affected by the proposal are those prepared by the Department of Corrections (DOC), at the court's request. She confirmed that the PSI report contains a sentencing recommendation from the DOC report writer, even though Wisconsin no longer has sentencing guidelines. Council members also discussed assessment tools. Council member Stephens clarified that it was not the goal of the committee to instruct other agencies on how to do their job. The committee operated under the assumption that everyone involved in the PSI process is dedicated and tries to do the right thing. The goal of the project was to improve attorneys' abilities to perform their jobs.

Council member Stephens then explained the scope of the revisions. She stated that the first major area of change affects the record on appeal. She explained that the proposal alters the procedure currently set forth in *State v. Parent*, and requires the inclusion of the PSI materials in the appellate record, unless a motion to exclude is granted, and addresses citation and discussion of PSI materials on appeal. She clarified that these proposals were widely supported by the various stakeholders.

The second general area of change affects the defendant's PSI interview. The proposal creates a statutory right to have counsel present during the interview. The committee was unable

to reach a consensus on this provision. Council member Stephens presented the arguments in favor of this amendment, as well as those opposing it, as reflected in her memorandum. Vice chair Schultz inquired as to the reasoning of the courts that have concluded that the Sixth Amendment does not apply to PSI interviews. The committee members described that courts do not consider those post-conviction interviews to be held at a critical stage. Council member Stephens offered to prepare a more detailed explanation for the next discussion.

Third, the proposal requires neutrality in report writing and adds content requirements. The statute is currently silent in this area. The recommendation is based on DOC's administrative rules. The Council discussed the meaning of "neutral," and the importance of the contents of the PSI report, not only for use in sentencing, but also for use by DOC when making programming decisions.

At this point Chair Hanan paused the substantive discussion to explain that Council member Stephens is unable to attend the October meeting, so it was important for the Council to complete its preliminary review of the PSI proposal at the September meeting. At the same time, the meeting must be concluded on time to allow members to attend previously scheduled committee meetings. Therefore, Chair Hanan announced that she would postpone the discussion regarding supreme court rule petitions, committee reports and other business on the September agenda until the next meeting so that the remainder of the meeting could be devoted to the PSI project.

The Council resumed its discussion. Council member Stephens explained that current law only addresses confidentiality of PSI materials after sentencing. The proposed amendments specifically authorize the circuit court to enter a protective order at any stage of the proceeding. The proposed amendments also require that victim information be contained in a portion of the presentence report capable of being severed to facilitate the execution of a court order to remove the victim information; however, the committee was unable to reach a consensus on severability. She summarized the arguments in favor of this amendment, as well as those opposing it, as reflected in her memorandum.

Council member Stephens discussed the proposed amendments regarding the report review process, which she described as the "heart of the proposal." She explained that current law requires the judge to disclose the contents of the report to the defendant's attorney, or to the defendant if he or she is unrepresented, and to the district attorney prior to sentencing. The current statute does not provide a specific process for the disclosure. The proposed amendments require the PSI writer to provide a draft of the report to both sides, and make a copy available to the defendant to review personally. The parties must then provide the PSI writer with written objections to any material information in the report. The PSI writer may amend the PSI report before submitting it to the court, or submit the report to the court along with any unresolved objections. At the sentencing hearing, the court is required to make a finding that controverted information is accurate or order it stricken from the PSI report. The PSI writer must create a final, corrected PSI report.

Council member Stephens summarized the arguments in favor of this amendment, as well as those opposing it, as reflected in her memorandum. She explained that the stakeholders all

support the defendant's right to be sentenced based on accurate information, but not all stakeholders agree that there are deficiencies under the current system. Most of the disagreement with this proposal is due to the imposition of a structured timeline. The proposal requires that 21 days prior to sentencing, the PSI report writer shall provide a copy of the report to the defendant's counsel, if any, and to the district attorney, and shall make an additional copy available to the defendant to review personally. The defendant then has 11 days to communicate objections to the report writer. The report writer then has seven days to file an amended PSI report with the court, or notify the court of the unresolved objections.

Because the committee was unable to reach a consensus on this proposal, she asked the full Council to make a decision regarding 1) retention of the provisions setting time limits to notify the PSI report writer of objections to incorrect information in the PSI report, and 2) requiring the PSI report writer to correct the report or inform the court about any material that is in dispute prior to sentencing.

The proposal also allows the defendant to view his or her PSI report after sentencing without a court order; however, the defendant may not keep a copy of the report in his or her possession. Additionally, the clerk of court is required to maintain a copy of all of the PSI materials. The proposal also requires an attorney to turn his or her copy of the PSI report over to any successor attorney. It requires that only the final PSI report, approved by the court at the sentencing hearing, is retained by DOC for use in future programming decisions or otherwise made available. Finally, the proposed amendments provide DOC with authority to correct PSI reports containing factual errors discovered after sentencing.

Council member Stephens noted a number of significant revisions to the proposal based on the feedback received by the committee from various stakeholders. These revisions are explained in her memorandum.

Chair Hanan asked council members to contact Attorney Southwick if there is any additional case law or other materials that they believe would assist them in consideration of the proposal. Council member Taylor asked that any additional requested material be sent to the entire Council. She also suggested that groups such as the community justice councils and Prison Action Milwaukee be notified of this project. Council member Leineweber inquired as to the timeline to review the proposal. Chair Hanan stated that she will confer with the various committee chairs regarding other pending matters to prioritize projects, although the PSI project will be the primary topic of discussion at the Council's November meeting. Council member Wagner asked which groups have already been asked to comment on the proposal. Council member Stephens stated that those groups are identified in the appendices to her memo, and copies of all written feedback is also included.

Attorney Southwick noted that due to some very minor recent amendments to the draft, the draft date was changed to September 14, 2010. The footnotes in the memo from Council member Stephens refer to a draft dated April 16, 2010. Attorney Southwick asked members to disregard the April 2010 draft reference, and instead refer to the September 2010 draft that was provided with the memo. The corresponding page numbers remain accurate because the amendments to the draft were very minor.

VIII. Committee Reports

- A. Appellate Procedure**
- B. Criminal Procedure**
- C. Evidence and Civil Procedure**

Chair Hanan postponed the committee reports until the October meeting.

IX. Other Business

- A. Supreme Court Advisory Committee on Rules Petitions Procedure Report**
- B. PPAC Liaison's Report**
- C. Assembly Judiciary Committee Report**
- D. Senate Judiciary Committee Report**
- E. Council Attorney's Report**

Chair Hanan postponed other business until the October meeting.

X. Adjournment

The Council adjourned by consensus at 11:40 a.m.