

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
December 16, 2011

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

MEMBERS PRESENT: Chair Thomas W. Bertz, William Gleisner, Cathlene Hanaman, Catherine A. La Fleur, Honorable Mark Mangerson, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Greg Weber, Honorable Maxine A. White.

MEMBERS EXCUSED: Vice Chair Rebecca R. St. John, Christine Rew Barden, Honorable Patricia S. Curley, Allan M. Foeckler, Representative Jim Ott, Honorable Patience Roggensack, Senator Rich Zipperer.

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

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:40 a.m.

II. Approval of November 18, 2011 Minutes

MOTION: Council member Shriner moved, seconded by Council member Stephens, to approve the November 18, 2011 meeting minutes. Minutes were approved unanimously without amendment.

III. Discussion and/or Action Regarding Modification of the Rules of Evidence Work Plan to Include Wis. Stats. §§ 885.205 and 905.04, Privileged Communications

Attorney Southwick circulated a memorandum proposing an amendment to the previously adopted rules of evidence work plan to add Wis. Stats. §§ 885.205 and 905.04, Privileged Communications. Council member Shriner explained that the Evidence & Civil Procedure Committee's work plan generally did not include the privilege chapter; however, these provisions have since been called to the committee's attention by an attorney at the Legislative Reference Bureau. Sec. 885.205 makes communications between students and school deans and psychologists privileged. This provision is located in the section where the former lawyer-client privilege statute was located prior to the adoption of the rules of evidence in the early 1970's. Sec. 885.205 overlaps with s. 905.04, physician patient privilege, which also covers communications with a psychologist. The LRB noted that while the two rules overlap, they contain different provisions. Attorney Southwick also noted that it appears s. 885.205 is seldom cited. She could only find one case citing the rule, and it contained only a passing reference to this provision.

MOTION: Council member Stephens moved, seconded by Council member Wagner, to modify the work plan, direct the Evidence & Civil Procedure Committee to study Wis. Stats. §§

885.205 and 905.04 (and any other provisions necessary to resolve the issue), and make a recommendation to the full Council. Motion approved unanimously.

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

A memo dated October 28, 2011, regarding significant changes and new provisions contained in the draft bill was previously distributed to members. Council member Schultz, who chaired the committee that drafted the proposed legislation, continued to lead the discussion on the proposed changes and new provisions.

Council member Schultz explained that a new provision (s. 968.71) allows the district attorney to apply for an order requiring a financial institution to disclose a person's status as a depositor. This change is intended to facilitate access to basic information without going through a formal procedure such as convening a John Doe hearing or a grand jury. He noted that this change was added primarily at the request of prosecutors. Council members discussed whether this provision could also be used in proceedings other than criminal matters. Council member Weber noted that the Department of Justice's Criminal Litigation Unit suggested that the Attorney General should also be authorized to apply for a court order, or in the alternative, authorize law enforcement to make the request for information and have the response made to a law enforcement entity. Council member Schultz explained that in the bill, the definition of "district attorney" includes the Attorney General. Judicial members were generally opposed to allowing law enforcement to obtain the information without a court order.

Sec. 969.15 lists the various ways that a person's appearance in court can be secured and it is intended to clarify the existing procedures which are currently found in multiple statutes. Council member Schultz reminded members that one of the guiding principles of the revisions was to allow an inexperienced, well-meaning practitioner to more easily locate information within the statutes.

Sec. 969.19 codifies case law regarding probable cause determinations for warrantless arrest. This provision is based on *County of Riverside v. McLaughlin*, 500 U.S. 44, which requires judicial determination of probable cause within 48 hours of arrest. The proposed amendment also provides a remedy for violation, which case law has not yet addressed. It requires that if a determination is not made within 48 hours, the person is entitled to release without financial conditions.

Sec. 969.25 allows the district attorney to release a defendant on bond before the initial appearance, and the provision is intended primarily for use in cases where the defendant is likely to be released without monetary conditions after the initial appearance. The drafting committee recognized that this provision would be used in a very limited number of cases, although it does fill a gap in current law. Council member Schultz explained that release subject to monetary conditions would still require a court appearance. Members discussed that this provision could be useful to enable law enforcement to ask the prosecutor to release a defendant who agrees to cooperate and assist law enforcement with an investigation. Currently, if law enforcement contacts a judge regarding release in that situation, it is a prohibited *ex parte* communication.

Judicial members generally agreed that it would be best to keep those discussions within the executive branch. This provision could also save the counties money by allowing prompt release by the district attorney to avoid the defendant spending a weekend in jail if a judge is not readily available. Council member Schultz could not recall if the Wisconsin District Attorneys' Association (WDAA) specifically offered an opinion as to this provision, but he recalled that a representative of the WDAA served on the drafting committee.

Sec. 969.32 lists the various types of release, including release without condition other than appearing when required and release on a personal recognizance bond. This provision does not change current law; it simply consolidates the various options in one location to make it easier to locate the information.

Sec. 969.37 was created to allow the return of a cash deposit to a third party. This provision allows a third party who posted bond for a defendant to seek return of the money prior to conclusion of the case. The drafting committee felt there should be an option when a third party posting a bond becomes concerned that a defendant is likely to violate the terms of release. If the money is returned, the defendant would either have to make alternative bond arrangements or return to jail.

Sec. 970.10 codifies current case law defining the prosecutor's authority to dismiss a complaint. Current law requires a court to grant a motion to dismiss unless granting the motion is contrary to the public interest. The proposal is consistent with *State v. Conger*, 325 Wis.2d 664 (2010). However, Council member Schultz noted that the draft prepared by the Legislative Reference Bureau (LRB) differs from the Council's proposed amendment. The LRB's version includes a broad provision that a defendant must consent to dismissal. The Council's original proposal requires defendant's consent to the dismissal only for motions to dismiss made during trial. Council member Schultz will conduct additional research to determine if the change was intentional or simply a mistake. He will report back to the Council at the next meeting.

Sec. 970.15 creates one general statute authorizing deferred and suspended prosecution agreements. It replaces several long, complicated statutes that purport to govern agreements in specified types of cases. The new provision defines deferred prosecution as a unilateral prosecutorial choice that gives prosecutors a lot of discretion. Suspended prosecution is defined as a case that has been commenced by filing a criminal complaint. In cases of suspended prosecution, the court has an interest so it required mutual agreement of the parties and approval by the court. This provision is intended to clarify the process, as well as to encourage consistent use of terminology and consistent practice from county to county. Members discussed motions to rescind, expiration of the agreement, the statute of limitations, and tolling; and how it can all impact the court's jurisdiction. Council member Schultz explained that deferred prosecution agreements are enforceable in the same manner as a plea agreement. In the case of suspended prosecution, the criminal complaint has been filed, and filing the criminal complaint and issuing a warrant tolls the statute of limitations. Council member Shriner questioned the authority to defer or suspend prosecution. Council member Wagner stated that the court has inherent authority to withhold judgment or sentencing. Council member White spoke in favor of creating specific statutory authority, suggesting that it would aid specialty courts.

Several new provisions relate to guilty plea procedure. Sec. 971.065 codifies current law and practice relating to plea agreements. Sec. 971.085 codifies current law and describes the effects of the different pleas available to the defendant. Sec. 971.093 codifies current law relating to plea withdrawals. Council member Schultz reminded the Council that the Criminal Procedure Committee was directed to study plea withdrawals and make a recommendation, although the Council generally opposed incorporating any changes into the draft criminal procedure bill.

Sec. 971.57 creates authority and a process to obtain nontestimonial discovery from third parties. The new provision is based on the Uniform Rules of Criminal Procedure and on the ABA Criminal Discovery Standards. This change is also consistent with changes states are making in connection with Innocence Projects. Members recognized that this is a significant provision, and discussed the rights of the third party subject to this provision.

Council member Schultz stated that the remaining items on page three of the October 28, 2011 memorandum all relate to changes to discovery and were previously discussed and approved by the Council at the last meeting. He suggested that the Council table further review and discussion until the next meeting, beginning with the items on page four. Council member Weber agreed, adding that he has not received feedback from other criminal practitioners at the Department of Justice with regard to sec. 971.57 and the remaining items in the memo. He asked that the Council postpone further discussion to allow DOJ time to prepare feedback. The Council agreed by consensus to resume its discussion, beginning with sec. 971.57, at the next meeting.

The Council discussed the importance of filling the current district attorney vacancy on the Council because input from a district attorney would be very helpful as the Council reviews the criminal procedure bill. Pursuant to Wis. Stat. § 758.13 (1), the position may only be filled through an appointment by the Governor. The WDAA provided the Governor's office with a written recommendation for an appointment to the position. Attorney Southwick has also contacted the Governor's office to request that the Governor act on the WDAA's recommendation. Several council members indicated that they have also contacted the Governor's office regarding the importance of having a district attorney appointed to the Council. Attorney Southwick stated that in the interim, a district attorney recommended by the WDAA serves as an *ad hoc* member of the Evidence & Civil Procedure Committee. A district attorney will also be appointed as an *ad hoc* member of the Criminal Procedure Committee prior to undertaking its new assignments, and a district attorney representative previously served on the committee that prepared the proposed revisions to the criminal procedure code. These *ad hoc* committee appointments provide the district attorneys with a voice during the drafting stage of Council projects. Until the district attorney vacancy on the Council is filled, Council member White suggested that the Council extend an invitation to the WDAA to send a representative to the Council meetings.

V. Discussion and/or Action Regarding Wisconsin Rules of Evidence

The Council agreed by consensus to table discussion of these items until the next meeting.

VI. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the Appellate Procedure Committee met on November 18th following the regular Council meeting. The committee reviewed the draft bill from the Legislative Reference Bureau containing the proposed amendments to the presentence investigation statutes. The bill contains some notes and questions from the LRB drafter, and the committee generated responses. Attorney Southwick prepared a letter relaying the committee's responses to the LRB drafter.

With regard to protecting the identity of victims and witnesses, the committee previously identified a list of information to study. Attorney Southwick has obtained and distributed most of the requested information to committee members. Given the large volume of information to review, the committee postponed substantive discussion on this project until its January meeting. Committee member St. John previously suggested that the committee appoint a crime victim advocate as an *ad hoc* member of the committee. Attorney Southwick announced that the Executive Director of the Office of Crime Victim Services for the Department of Justice has accepted the appointment. She will begin her service on the committee beginning with the January meeting.

B. Criminal Procedure

Committee Chair Schultz had no further report.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee met on November 18th to continue its work on the rules of evidence project. The committee completed its review of Wis. Stats. §§ 906.08, 906.09 and 908.01.

The committee will meet today after the regular Council meeting to continue its study of the hearsay exception for statements of recent perception, s. 908.045 (2). The committee will also continue to study *Alt v. Cline*, 224 Wis.2d 72, which basically created a privilege permitting experts to refuse to testify in certain circumstances, and discuss whether the *Alt* rule should be codified. Finally, the committee will begin to study the possible inconsistency involving s. 885.205, which creates a privilege for communications between students and school psychologists or deans.

VII. Other Business

A. PPAC Liaison's Report

Council member Wagner reported that PPAC continues to work on rules to address *ex parte* communications and confidentiality of information obtained in specialty courts such as drug courts.

B. Council Attorney's Report

Attorney Southwick reported that she was an invited speaker at a Department of Transportation in-house continuing legal education seminar. She presented on the new e-discovery rules drafted by the Council. Evidence & Civil Procedure committee member Judge Leineweber presented at the Eastern District's E-discovery conference.

Attorney Southwick continues her efforts to schedule appointments with the Council's legislative members to discuss the criminal procedure draft bill, as well as the presentence investigation draft bill.

VIII. Adjournment

The Council adjourned at 11:25 a.m.