



Wisconsin Judicial Council

Recommendations Regarding Priorities, Planning and Operations

FINAL REPORT

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I. Introduction

The Wisconsin Judicial Council was created by the Legislature in 1951 as an independent judicial branch agency. Wisconsin Statute section 758.13 provides that the Council shall review the rules of procedure; make recommendations regarding the structure, administration and operations of the courts; consider suggestions from other entities regarding the administration of the courts; track of legislation and rules affecting the operation of the courts; and make recommendations regarding legislative acts affecting administration of the courts.¹ The Council is composed of 21 members.

The Council's principal focus since its inception has been to review and conduct technical research on pleading, practice and procedures in the courts, and to make recommendations to the Supreme Court and the Legislature regarding court procedures. The Judicial Council historically played a pivotal role in the development of most major rules or rules revisions and in the development of a significant number of legislative enactments affecting court procedure.

The Judicial Council was assisted in its work by an executive secretary, and additional staff support. The secretary provided important professional research and drafting support, and assisted the Council in liaison with judicial, legislative and executive branch agencies. Obviously, the staff also provided needed logistical support for the Council and its membership.

¹ A judicial council had existed prior to the statutorily created Council, but was an advisory committee of the Supreme Court, created in 1929.

In 1995, the staff positions were eliminated from the Council's budget, and responsibility for staff support was assigned to the staff of the Judicial Commission.² No additional staffing was provided to the Judicial Commission.

Obviously, the loss of staff support had a significant impact on the Judicial Council's operations. The Judicial Council was not able to maintain its ability to undertake significant research and drafting projects at its prior pace. Major rule revision and research projects took much longer, relying almost solely on the contribution of the time of members. Given the Commission's own responsibilities, Commission staff support has necessarily been limited primarily to logistical support for Council organization and meetings. Not surprisingly, the ability of the Judicial Council to play a timely or a central role in the development and revision of rules and legislation affecting court procedures has been diminished.

Recently, the Judicial Council, on the recommendation of its Strategic Planning Committee, requested the National Center for State Courts to (1) review the status of the Judicial Council, including its current resources and the current rulemaking environment; (2) assess the Council's resources, organization, and productivity in relation to its legislative mandate and the needs of the Wisconsin court system; and (3) make recommendations regarding its operating procedures and on the future role of the Council.³

² The Judicial Commission is an independent agency charged with investigation and prosecution of judicial misconduct.

³ Since the time the Council determined to review its operations and future course, the Legislature approved the addition of limited direct staff support for the Judicial Council.

II. Methodology

In order to gather information to conduct the assessment and formulate recommendations, we reviewed documentary information regarding the history of the Judicial Council (including statutes); current documentation regarding the structure and internal operations of the Council; recent records of Judicial Council proceedings; and past reports and correspondence regarding the Council's operations, structure, and budget.⁴ Current rules and operating procedures regarding the administration of the courts were reviewed, as well as recent materials regarding the operations of the Planning and Policy Advisory Committee of the Wisconsin Supreme Court.⁵

On-site data gathering included observation of a Judicial Council meeting, and interviews with Judicial Council members, Judicial Commission staff, the Chief Justice, and Director of State Courts staff,⁶ and a former executive director of the Judicial Council.

Table II-1 Interviewees

Name	Title/Position
Prof. David E. Schultz	Professor of Law, University of WI Law School, Judicial Council Member (former Judicial Council Chair)
Ms. Beth E. Hanan	Attorney at Law, Judicial Council Member (Vice-Chair)
Ms. Marla J. Stephens	Appellate Division Director, Office of the State Public Defender, Judicial Council Member (Chair)
Mr. Greg M. Weber	Assistant Attorney General, Judicial Council Member
Ms. Erin Slattengren	Senior Policy Analyst, Director of State Courts Office
Hon. Ann Walsh Bradley	Supreme Court Justice, Judicial Council Member
Hon. Edward E. Leineweber	Judge, Richland County, Judicial Council Member

⁴ For example, a legislative fiscal bureau report from 1985 regarding the Judicial Council was particularly helpful in providing historical information.

⁵ The Planning and Policy Advisory Committee was formally established by the Wisconsin Supreme Court by Supreme Court Rule 70.14 to "advise the supreme court and the director of state courts in the director's capacity as planner and policy advisor for the judicial system."

⁶ The Director of State Courts could not be interviewed during the site visit due to a last minute schedule conflict. He was later interviewed by phone.

Name	Title/Position
Hon. Shirley S. Abrahamson	Chief Justice, Wisconsin Supreme Court
Mr. John Voelker	Director of State Courts ⁷ , Judicial Council Member
Mr. James Alexander	Executive Director, Wisconsin Judicial Commission ⁸
Mr. Bruce Munson	Revisor of Statutes, Judicial Council Member
Ms. Marygold Melli	Professor Emeritus, University of WI Law School, former Executive Director of Judicial Council ⁹
Ms. Sheryl Gervasi	Deputy Director of State Courts for Court Operations

III. Historical Summary of Judicial Council Operations

It is important to understand the history of the Judicial Council, and the current context in which the Council operates, to establish how to best focus the expertise of the Judicial Council to fulfill its appropriate role in the administration of justice. Responsibility for oversight of the operations of the court system rests with the Supreme Court and its offices, not with the Council.¹⁰

The Wisconsin Judicial Council was created by the Legislature in 1951 as an independent judicial branch agency, with a broad mandate which included the study of the rules of procedure in Wisconsin courts; the study of the organization, jurisdiction and operation of the courts; and making recommendations regarding those topics.

Initially, the Council consisted of 19 members. The current 21 members include:¹¹

- One supreme court justice designated by the Supreme Court
- One court of appeals judge designated by the Court of Appeals

⁷ Interviewed by telephone.

⁸ In his role as Judicial Commission Executive Director, Mr. Alexander functioned as executive staff for the Judicial Council from 1995 to the present.

⁹ Interviewed by telephone.

¹⁰ "The supreme court shall have superintending and administrative authority over all courts." Article VII, § 3 (1), Wisconsin Constitution. Also, "The chief justice of the supreme court shall be the administrative head of the judicial system and shall exercise this administrative authority pursuant to procedures adopted by the Supreme Court." Article VII, § 4 (3), Wisconsin Constitution.

¹¹ Wisconsin Statutes, § 758.13 (1).

- The director of state courts or his or her designee
- Four circuit judges designated by the judicial conference
- The chairpersons of the senate and the assembly committees dealing with judicial affairs or a member of each such committee designated by the respective chairperson
- The attorney general or his or her designee
- The revisor of statutes or an assistant designated by the revisor¹²
- The deans of the law schools of the University of Wisconsin and Marquette University or a member of the respective law school faculties designated by the deans
- The state public defender or his or her designee
- The president–elect of the State Bar of Wisconsin or a member of the board of governors of the state bar designated by the president–elect
- Three additional members of the state bar selected by the state bar
- One district attorney appointed by the governor
- Two citizens at large appointed by the governor to serve three–year terms

The current statutory responsibilities of the Judicial Council remain largely the same as in the statute as originally enacted in 1951:

- (2) POWERS AND DUTIES. The council shall:
- (a) Observe and study the rules of pleading, practice and procedure, and advise the supreme court as to changes which will, in the council's judgment, simplify procedure and promote a speedy determination of litigation upon its merits.
 - (b) Survey and study the organization, jurisdiction and methods of administration and operation of all the courts of this state.
 - (d) Receive, consider and in its discretion investigate suggestions from any source pertaining to the administration of justice and to make recommendations.
 - (e) Keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.
 - (f) Recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the courts, including statutes governing pleading, practice, procedure and related matters, which can be put into effect only by legislative action.

¹² Effective December 31, 2007, the revisor of statutes is replaced by the chief of the legislative reference bureau or his or her designee. 2007 Act 20, s. 3707p.

- (g) Recommend to the Supreme Court, legislature and governor any changes in the organization, operation and methods of conducting the business of the courts that will improve the efficiency and effectiveness of the court system and result in cost savings.¹³

In the early years, the Judicial Council focused attention on the structure and organization of the judicial system, in addition to its now more familiar role of studying and drafting of rules and legislation relating to court procedure. Its staff collected and published the first statewide court workload statistics.¹⁴ Those statistics demonstrated the uneven distribution of caseload across the state in relation to the distribution of courts and judicial resources. In addition the Council staff, particularly during the years leading up to the 1959 reorganization of the court system, studied the administrative operations and organization of the courts.¹⁵

The Wisconsin Judicial Council, along with the State Bar, was at the forefront of efforts in the 1950's to reorganize the judiciary. In the early 1950's Jack DeWitt, chair of the Council, and E. Harold Hallows, President of the State Bar, led efforts for a constitutional amendment. An amendment proposed by the Council which would have led to expansion of the circuit court and abolition of most county courts was initially approved by the Wisconsin Legislature in 1955, but failed to win approval in the 1957

¹³ Wisconsin Statutes, §758.13 (2), (2005-06).

¹⁴ "Wisconsin's Legal History: Part XVI - Practicing Law in 20th Century Wisconsin, Part 1: The Courts and the Bar Grapple with Growth," by Joseph A. Ranney, Madison, 1997. Published on the Wisconsin State Bar website, <http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/cm/htmldisplay.cfm&contentid=35863>

¹⁵ Interview with former Executive Director Marygold Melli.

legislative session.¹⁶ Subsequently, the Judicial Council, again with the support of the State Bar, proposed a successful plan which maintained local county courts, made all courts full time “of record courts,” and provided for a state level system of court administration.^{17,18}

With the reorganization, increasing responsibility and authority for state level court administration, including monitoring court workload, was given to the administrative director of courts. That post was created by the legislature in 1961 as part of court organization. The position was later redefined by the Wisconsin Supreme Court and renamed the Director of State Courts. In the years since that time, as the need for and interest in improved administration of the courts increased, the Supreme Court has refined and enlarged the role of the Director of State Courts office.¹⁹ In 1969, the Council’s power to collect, compile, analyze and publish statistics pertaining to court operations, set forth in sec. 758.13 (2) (c), was repealed.²⁰ The Legislature subsequently added a range of administrative functions to the duties of the Director of State courts as well, including the calculation and distribution of state funds for the

¹⁶ The Wisconsin Constitution requires that proposed constitutional amendments must be approved by both houses in successive sessions of the legislature, and subsequently in a popular referendum. Article XII, §1, Wisconsin Constitution.

¹⁷ “Wisconsin’s Legal History: Part XVI - Practicing Law in 20th Century Wisconsin, Part 1: The Courts and the Bar Grapple with Growth”, supra.

¹⁸ Interview with former Executive Director Marygold Melli.

¹⁹ The Supreme Court Rules, Chapter 70, Rules of Judicial Administration outline the parameters of the administration of the Wisconsin court system, and throughout provide for a variety of functions and responsibilities for the Director of State Courts office. Supreme Court Rule 70.1 identifies the Director of State Courts as the “...chief non-judicial officer of the court system...,” and specifies the authority and responsibility of the Director.

²⁰ L. 1969, c. 154, § 368.

operation of circuit courts to counties and the planning and operation of a statewide court information system.²¹

Since its formation, the Judicial Council has had as a principal focus the review of court procedure and the development and drafting of rules and statutes governing those court procedures.²² Typically, the core of the Judicial Council's work has consisted of significant projects for study, and the development and/or revision of major areas of the rules and laws regarding court procedures, such as the law regarding long arm jurisdiction, the rules of evidence, the homicide laws, competency to stand trial, the insanity plea, small claims court procedures, the rules of appellate procedure, alternative dispute resolution and judicial substitution procedures. The Council has also taken on smaller projects to examine more focused, discrete issues (often based on referral of questions from the Supreme Court).

While ideas for possible subjects of Judicial Council study have come from a variety of sources, including the Supreme Court, the State Bar, the Legislature, the Director of State Courts, and Council members; the selection of projects and areas of study are within the discretion of the Judicial Council. Proposals and requests for Council work projects are first reviewed and approved by the entire membership prior to the commencement of substantial study and work effort.

²¹ Wisconsin Statutes, § 758.19.

²² In Wisconsin, like many other states, both the Supreme Court and the Legislature have a shared role in regulating court procedure. Wisconsin Statutes, §751.12 (1) provides, "the state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant." The Wisconsin Supreme Court has also recognized an inherent authority for rule making in certain areas.

The methodology for Judicial Council study and revision projects that developed early on was a deliberative approach designed to build consensus among a broad cross-section of legal professionals regarding effective and fair procedures. In view of the time consuming nature of such a study and drafting process, the limited time of Council members, and limited staff resources; the Judicial Council would typically be able to take on only one or perhaps two major court reform projects at any given time. Those projects would often take six months to a few years to complete. Simultaneously, the Council would often take on smaller, more discrete study or revision projects as mentioned above, often at the request of the Supreme Court.²³

Once a project was selected, a project committee was frequently established to conduct the initial study and develop initial rule or law drafts. These committees were not limited to Council members. The Council would routinely appoint non-Council members from other organizations based on the nature of the project, to ensure inclusion of stakeholders with an interest or expertise in the subject matter and to ensure development of broad based consensus regarding the project outcome. The final work product, however, was reviewed, vetted and approved by the entire Judicial Council.

As a project was nearing completion, drafts were shared with the Legislative Reference Bureau for review and suggestions, to ensure that the Council's work product

²³ For example, in the course of its deliberations, the Supreme Court might identify a gap in procedure in a discrete area, such as appellate procedure, and request the Judicial Council to make recommendations regarding rules to bridge that gap. According to Chief Justice Abrahamson and Justice Bradley, the Judicial Council is viewed as a valuable resource for advice on procedure given its broad based membership of legal practitioners, and its reputation for thorough, balanced and well-documented work products.

is consistent with the Bureau's standards for drafting style and numbering. The Legislative Reference Bureau has the responsibility to prepare all legislation that is to be introduced.²⁴ If the work product is a proposed rule, it will in most cases be submitted to the Bureau for review and suggestions as to drafting style and numbering.²⁵

The Executive Director played a crucial role in the work of the Council and its committees. In addition to managing general administrative functions (personnel, financial management, budget, etc.) and the logistics associated with Council and committee meetings (with the aid of an administrative assistant), the Executive Director assisted the Council Chair in planning and preparing Council meeting agendas, conducted background research on agenda items and for projects, developed legal memoranda and drafts for review by the Council and committees, kept detailed minutes of Council and committee deliberations, and acted as liaison to the Legislative Reference Bureau, other state agencies, and other stakeholders.

IV. Current Judicial Council Context, Structure and Operations

In 1995, the Legislature eliminated all staff positions for the Judicial Council, and transferred the responsibility for staff support of the Council to the Judicial Commission. No additional staff was allocated to the Judicial Commission for support of Judicial Council work.

The Judicial Commission staff consists of an Executive Director and an administrative assistant position. The Judicial Commission does not have adequate

²⁴ Wisconsin Statutes, § 13.92 (1) (b) 1.

²⁵ Supreme Court Rule 98.03.

staffing to provide research, drafting, planning, liaison, or to maintain the detailed records of Council decision-making that were critical to the support of the Judicial Council's approach to its work. Despite the best efforts of the Council members themselves to take on additional responsibilities for research and drafting functions, the loss of dedicated staff has severely curtailed the pace at which the Council can address significant projects for development and revision of procedure. For example, a major project to develop new rules of criminal procedure has been underway for years.

The Judicial Commission is an independent judicial agency with responsibility for the investigation and prosecution of judicial misconduct. The assignment of its staff to provide support for the Judicial Council, whose role is to provide advice on the administration of the judiciary and judicial rules of procedure, and whose membership includes judges, also sets up a potential conflict for both entities and the shared staff. Priorities for the two entities and their respective roles are obviously significantly different. Both entities were established as independent agencies in order to ensure the independence and integrity in operations and decision-making. Sharing staff clearly threatens those objectives.

While the general approach to Judicial Council projects remains similar, there have been changes to Council operations and organization since 1995.

As noted above, the loss of dedicated staff severely curtailed the pace at which the Judicial Council is able to address its work, particularly major projects. According to the Executive Director of the Judicial Commission, the amount of time that can be devoted to Judicial Council activities has been limited to approximately 20% of the

available Judicial Commission staff time, and has generally been focused on general administrative functions in support of operations (e.g., financial management, budget preparation), preparing for and participating in Judicial Council meetings (preparing agendas in collaboration with the Council chair, making meeting arrangements, mailings), and preparing summary records of full Judicial Council proceedings. Commission staff time has not been available to staff the Council committee meetings, conduct significant research, prepare rule drafts, make detailed records of Council and Committee deliberations, provide a liaison function, or track significant developments in the law regarding court procedures.

The Judicial Council has established standing committees of its membership to focus on major substantive areas of the law, including the Criminal Procedure Committee, the Evidence and Civil Procedure Committee, and the Appellate Procedure Committee. These committees serve as pools of expertise for the Council to address the research and drafting requirements for specific projects (the Criminal Procedure Committee, for example, has primary responsibility for the Council's project to develop new criminal procedure rules) and as a means of staying abreast of developments in the law in their respective substantive areas. The Committees also serve as a resource to identify recommendations for Council projects, and to review recommendations from external sources for Council projects. The full Council, however, must approve projects before substantive work can be undertaken by the Council or one of its Committees.

The Council has also created a Strategic Planning Committee to study the continued viability of, need for, and appropriate role for the Council, given its resources

and the needs of the judiciary. The Committee was also asked to develop a planning process to guide efforts to regain staff for the Council, if that was determined to be an appropriate course of action. The Committee has also undertaken research regarding the respective responsibilities of the Supreme Court and the Legislature for adopting court procedures in order to provide guidance on how proposed procedural changes should be implemented.²⁶

An Internal Operating Procedures Committee was established to determine the desirability of developing and maintaining internal operating procedures for the Council.

In 2005, the Judicial Council adopted informal operating procedures outlining the general approach to activities of the Council and its committees. These informal operating procedures reinforce the policy that new projects may be undertaken only after review and approval by the full Council, provided that significant projects will be handled through committees and smaller projects will be handled by the Council as a whole, and establish an annual review of the list of pending projects and requests. They provide that, in evaluating whether to undertake new matters, the Council will consider:

- a. Whether other entities are working on the matter
- b. Whether it would be more appropriate for another entity to work on the matter
- c. Whether the amount of time and level of resources required for a competent inquiry into the matter is adequate
- d. Whether the Council or its existing committees has that time and those resources

²⁶ Committee Chair Hon. Edward Leineweber was the principal author of a research paper entitled "The Power to Regulate Practice and Procedure," completed in late 2006.

Other changes have taken place in the legal and court environment in recent years. As noted previously, the Director of State Courts office has specific responsibilities for administration of the judiciary. The role and responsibilities of the office expanded substantially since its creation in 1961, and that role has continued to expand in recent years. According to Supreme Court Rules, those responsibilities include management of state level court personnel, development and planning of the budget for the court system, development and operation of the state court information system, delivery of judicial and court staff education, planning and research for the court system, judicial assignments, oversight of the court public information function, and legislative liaison. The Director is also to serve as "advisor to the supreme court, particularly on matters relating to improvements within the system..."²⁷

The Supreme Court has also created a Planning and Policy Advisory Committee, consisting of judges, lawyers, county government representatives, a court administrator, a court clerk, and court commissioner; and is chaired by the Chief Justice. The role of the Committee is to advise the Supreme Court and the Director of State Courts regarding appropriate changes in the administration and operations of the state's courts, to advise on the expeditious handling of court business, and to assist in planning and setting priorities for the courts budget resources.²⁸

Finally, and most important for future operations of the Judicial Council, the state budget for the 2007-2009 fiscal biennium (2007 Wisconsin Act 20, enacted 10-26-07) creates and funds a full time staff attorney position for the Judicial Council and repeals

²⁷ Wisconsin Supreme Court Rule 70.01.

²⁸ Wisconsin Supreme Court Rule 70.14.

the provision requiring the Executive Director of the Judicial Commission to provide staff services to the Council. The newly enacted budget does not restore the level of staffing that was available prior to 1995, when the staff consisted of an Executive Director and an administrative support person. Obviously, therefore, the Council cannot expect that the newly authorized staff attorney will be able to provide support at the level provided prior to 1995. A significant share of the staff time will need to be devoted to general administrative and logistical functions, limiting professional support for research, drafting, and liaison functions. Unquestionably, the assignment of a full time staff attorney to act as Executive Director of the Judicial Council will revitalize the Council and increase its ability to address projects more thoroughly and expeditiously.

V. Assessment and Recommendations

During the course of interviews with Judicial Council members and other stakeholders, several themes emerged regarding the value of the work of the Judicial Council, and regarding approaches to conducting the work of the Council.

- Almost universally, interviewees stressed the value of the detailed record that was once maintained of Council and committee deliberations. The record serves as a valuable resource to lawyers and judges in determining the intent of procedural rules, and shed light on the issues considered in the development of rules.
- The independent status of the Judicial Council, its broad based membership, and the practice of creating project specific committees with added membership for major work projects is valuable in ensuring that the Council's work on court procedure is balanced and free of inappropriate partisanship. In addition, the

inclusiveness of project committees helps to build consensus for proposed changes in procedure.

- Most believe that major procedural rules projects were the most important product that the Judicial Council could contribute to the improvement of the court system. Generally, there was a feeling that some resources should be available to address smaller, more discrete rules projects. Most expressed the view that the Judicial Council should continue to be highly selective when approving projects.
- The lack of dedicated staff support has had a crippling affect on the effectiveness of the Judicial Council in completing its work. The resulting delays in completing work projects has made it more difficult to maintain momentum on major rules projects, and more difficult to build and maintain consensus on key issues. Because drafting is now accomplished by individual Council members, it is difficult to maintain consistency. This results both in the need to spend additional effort to reconcile drafts, and the burden of drafting falling to selected individuals who have full-time responsibilities elsewhere, which in turn causes further delay.
- In the absence of staff support, Committees have necessarily taken on the responsibility to alert the Council to developments in the law.
- There is mixed reaction to the appropriate role of standing subject matter committees. Some see the value of standing committees in maintaining an awareness of the law in specific subject areas, using the expertise of the committees to identify potential issues for Council attention, and taking advantage of that expertise to conduct research and drafting activities. Some, however, expressed a concern that the use of standing committees may dilute the value of the broad based membership in ensuring a balance of perspectives in the drafting process, and in ensuring consensus across a broad spectrum of legal professionals.

Recommendation 1: The Judicial Council should maintain and reinforce as its principle focus the undertaking of major law revision projects relating to practice and procedure.

The Judicial Council has severely limited resources. The Council's legislative mandate also includes broad provisions regarding reviewing and making recommendations of the organization, administration and operations of the courts, and tracking pending legislation and court decisions. However, fully embracing those functions would require far more resources than are available.

The context in which the Judicial Council in Wisconsin operates is substantially different than judicial councils in other jurisdictions. The Wisconsin Judicial Council is established as an independent judicial agency, to provide advice to the Supreme Court, the Legislature, and the Governor. In other jurisdictions, judicial councils have been established as agencies within the judicial branch to oversee the administration of the judiciary (as is the case in California) or to advise on or develop judicial administrative policy (as in Utah). Furthermore, the Council's functions relating to advising on the structure and administration of the judiciary, and tracking legislation affecting the judiciary overlap with the role of offices and committees established by the Supreme Court to assist it in carrying out its "...superintending and administrative authority over all courts."²⁹ The Director of State Courts is responsible for tracking pending legislation and developing analyses of the impact of legislation on the judicial system, and has full time staff dedicated to the function. Similarly, the Director's office has a responsibility to oversee administration and to advise the Supreme Court regarding the organization

²⁹ Article VII, §3 (1), Wisconsin Constitution.

and functioning of the judiciary. The Supreme Court has also established the Planning and Policy Advisory Committee for the purpose of advising the Supreme Court and the Director of State Courts of changes in administration and operations of the states courts, and providing advice regarding judicial system planning and resource allocation.

It is also important that the Judicial Council avoid taking on projects to merely review and comment on the work products of other entities. The strength of the Judicial Council, as noted previously is its independence, and the diversity and expertise of its membership. Taking on the review of the work of other entities would divert resources and allow other entities' priorities to interfere with Council priorities.

In planning its work, the Judicial Council should preserve limited resources to address smaller, more discrete rules projects that it deems critical to the effectiveness and efficiency of court procedures.

Recommendation 2: In evaluating issues for Judicial Council action and managing its workload, the Council should ensure that the staff attorney will be available to provide drafting services and a detailed record of Council and Committee deliberations.

As noted above, the restoration of a full time attorney position will provide a significant advantage to the Judicial Council in improving the effectiveness and efficiency of its operations. However, it is not likely that the staff attorney will be able to perform all of the support functions provided by the Executive Director prior to elimination of the position in 1995. The lack of an additional position for administrative support will mean that a portion of the staff attorney's time will need to be devoted to the ministerial tasks of administration, finance and Council logistical support.

The maintenance of a record of Judicial Council deliberations is highly valued by judges and legal practitioners as a source of information regarding rules of procedure enacted by the Supreme Court through or by the Legislature. The renewal of this practice should be a priority for the Council and for the Judicial Council's staff attorney.

Producing draft procedures for Judicial Council in a timely and consistent fashion is critical to the effectiveness and efficiency of the Judicial Council's work on court procedure. As noted previously, draft rules and legislation must adhere to principles established by the Supreme Court and the Legislative Draft Bureau, respectively. Relying on Council and Committee members to develop drafts diminishes the efficiency of the Council's work process, and does not make best use of the limited time of members. The members' time is best spent addressing policy issues related to procedure development and to reviewing and commenting on drafts.

Allocation of drafting responsibility to a group of individuals, as noted earlier, is inefficient and prone to cause inconsistency in style. Further, while members are selected for their expertise in certain areas of the law and for professional standing, they do not necessarily have experience in rules or legislative drafting. It is unreasonable to expect that members can develop the kind of experience and expertise that a dedicated staff would bring or be able to develop.

Finally, the effectiveness of the Council in its work, and developing and maintaining consensus for that work, is often negatively impacted by prolonged delays. Ensuring that drafts are produced consistently and in a timely manner will reduce that delay.

Recommendation 3: The Internal Operating Procedures Committee should be eliminated, and its responsibility for recommending operating procedures should be delegated to the current Strategic Plan Committee.

Since the Judicial Council approved the informal operating procedures recommended by the Internal Operating Procedures Committee, the Committee has been largely inactive.

Operating procedures are affected by, and have an impact on, planning for Council work. It would be more practical to assign the responsibility for analysis and recommendations regarding the Council's operating procedures to the Strategic Plan Committee.

Recommendation 4: Rename the Strategic Plan Committee as the Planning and Operations Committee, and give the committee responsibility for (a) annually developing recommendations regarding priorities for the work of the Council based on input from subject matter committees and judicial system stakeholders, (b) developing recommendations for changes in operating procedures, (c) assisting the Chair in the oversight of Council staff functions and priorities, and (d) assisting the Chair and the Council staff attorney in developing budget plans and requests for approval by the Council. The Council Chair and Vice-Chair should continue to be members of the Committee.

As noted previously, the resources of the Council are limited. Members and stakeholders noted the need to carefully scrutinize issues for Council action based on the availability of limited resources, the impact of potential projects on the improvement of court procedures, and the availability of other entities to address potential projects. Accordingly, planning for Council work should become a regular, structured process.

On an annual basis, with the assistance of the Council staff, the Committee should undertake an assessment of the status of ongoing projects and the resources and time that are projected for completion of those projects. With that information, the Committee can estimate the resources that will likely be available for new projects.

Using as a basis preliminary input from the standing subject matter committees, and suggestions for projects received from Council members and outside sources (these suggestions have been maintained on a pending list for periodic review by the Council), the Committee should conduct a survey of key judicial and legal system stakeholders (such as the Supreme Court, the State Bar, the Director of State Courts, the Conference of Chief Judges, the Planning and Policy Advisory Committee, the judiciary committees of the House and Senate, legislative leadership, the Governor's office, specialized legal practice organizations, and other entities) to receive structured input regarding the priorities for the Council.

In order to ensure structured input, surveys should be constructed to allow stakeholders to rank the importance of possible projects identified by the Committee through the preliminary input of substantive committees, individual Council members and suggestions received from other entities. The Committee should identify a list of potential projects which appear to be relevant and timely, and within the mandate and resources of the Council.³⁰ The survey should be structured to allow separate ranking of major, long-term projects and more discrete, short-term projects. Finally, an

³⁰ The danger of listing all ideas received, or too many projects, is that it will be more difficult for respondents to provide meaningful input on priorities. Further, if the Council can only reasonably handle a few major projects annually, the value of lower priority rankings is diminished. There is also a possibility of unnecessarily raising expectations.

opportunity for respondents to identify other potential projects not included in the structured potential project lists should be included as well.

Using this feedback, its own experience, and an assessment of available Council resources, the Committee can then develop recommendations for annual work plan priorities, including suggestions for one or two top priorities for major work projects, suggestions for prioritizing more discrete projects, and suggestions for elimination of potential projects that do not warrant the attention of the Council.

In developing those recommendations for the Council, the Committee (and subsequently, the Council in its review of the Committee's recommendations) should plan to reserve some capacity during the ensuing year to absorb a small number of short-term projects that may arise and require immediate attention. Because it is difficult to anticipate such needs, the plan for short-term projects should remain flexible and provide for prioritization of those undertakings without making a firm commitment to a specified number of projects.

Operating procedures have a significant impact on the Judicial Council capacity to accomplish its work. Similarly, planning for Council work is contingent upon the availability of staff and budget resources, and the processes used by the Council to accomplish its work. Accordingly, it would be most effective to consolidate the planning and operations oversight advisory function in a single committee.

Recommendation 5: The long-term membership of standing committees should consist of Council members, with ad hoc members added only for a limited term for specific work projects. Except when tasked by the Council with a specific procedure development or revision project, the core function of standing

committees should be limited in scope to monitoring developments in the law and making recommendations to the Planning and Operations Committee and the full Council regarding the need for and relative importance of potential projects. When a standing committee is tasked with a specific project, the Council should identify additional ad hoc members from the Council and outside the Council based on the subject matter of the project.

Existing standing committees appear to have been formed initially to address major procedural reform projects. Some of those projects, for example, the initiative to develop new rules of criminal procedure, are ongoing. In addition, however, these substantive committees have been from time to time tasked with additional projects falling within subject matter areas of the Committee.

The informal operating procedures of the Council call for approval of work projects by the full Council prior to substantive action by Committees and provide that some projects of limited scope may be addressed by the Council as a committee of the whole.

As noted earlier, the recognized values of the Council's work is its independence, its broad based membership, and its ability and practice of drawing on external stakeholders resources to assist with the work of the Council. Though standing committees offer the advantage of the expertise of their members, static membership has the potential to dilute the advantages realized through the appointment of project specific committees to broaden inclusion and ensure consensus building in the wider legal community.

This recommendation does not necessarily mean a significant shift from current practice, since the Council has continued to adjust the ad hoc membership of standing

committees based on the subject matter of assigned projects. It does mean, however, that the core expertise of permanent standing committee members can be focused on identifying and prioritizing the need for revisions in the committee's substantive area of legal procedure.

Operating procedures should be fine-tuned to clarify that when a specific project is approved, the project should be assigned to the full Council, a standing committee, or a specially constituted committee; and that ad hoc members should be appointed to the Council or the assigned committee as needed to address the specific project.

Recommendation 6: As an initial and immediate priority, the Judicial Council should review the status of the project for development of new criminal rules of procedure, and, when available, assign the newly appointed staff to assist the Criminal Procedures Committee in completing remaining work as the first priority.

Most of the Council members and stakeholders interviewed commented on the importance of this project, and some expressed frustration at the length of time that the project has taken and level of effort that has been devoted to date. The work on the project has been shouldered by Council and committee members, and a substantial share of the work on drafting and interaction with the Legislative Reference Bureau has fallen to the Committee chair.

Criminal law generally is one of the most dynamic and rapidly changing areas of the law, and that is true in Wisconsin as well. The longer it takes to complete the new rules, the more likely it is that the enactment of new substantive and procedural law will require re-visiting prior work of the Committee. It is critical to ensure the viability of

the rules when completed, and to conserve future resources of the Judicial Council, that the project be completed as quickly as possible, and that the Committee's remaining work receives priority commitment of available staff support.

The Council might also consider, given the priority of the project, employment of a lawyer with criminal law and drafting experience on a limited term contract basis to assist with project completion. Though the newly approved Judicial Council budget is not substantial, it is possible that some budget savings will accrue during the current fiscal year while recruitment of a permanent full time staff attorney is underway.

Recommendation 7: The Council staff attorney's responsibilities should be prioritized to be consistent with the preceding recommendations. In addition to general administrative and logistics support functions, the higher-priority duties of the Council's staff attorney should include attendance at Council and project committee meetings, drafting and maintaining detailed records of Council and project committee deliberations, conducting research and preparing briefing materials regarding Council projects and potential projects, preparing draft procedures for review by the Council and project committees, and assisting the Council Chair and the Planning and Operations Committee in developing annual Council work plans.

As noted previously, the maintenance of records of Council and committee deliberations, and the timely preparation of procedure drafts for review by the Council and its committees, are key to the effectiveness and efficiency of the Council. The existing records of Council deliberations undertaken prior to 1995 are highly valued by Council members, judges and Justices of the Supreme Court, and legal practitioners. Similarly, the implementation of a more formalized work planning process is important to ensure that the Judicial Council is able to focus its efforts on areas of legal

procedures that are most important for improving the efficiency of the judiciary and the legal system as a whole.

Those priorities alone are likely to consume all or a majority of the available staff time, particularly initially. However, other duties that should be considered for the Council's staff attorney, as his or her time permits, include:

- Liaison with the Legislative Drafting Bureau regarding Council drafts.
- Preparation of legal briefing and research documents for the Council relating to developing areas of the law and the administration of justice and regarding other matters of interest to the Council.
- Liaison with other legal entities to keep abreast of the activities of those organizations, particularly as it relates to development of rules of procedure.³¹

Each of these functions should be included in the description of the job duties for the staff attorney, with the understanding that priority will be given to the functions as outlined above, and that the Council Chair, with the assistance of the Planning and Operations Committee, will provide ongoing oversight for the alignment of staff resources with Council activities and priorities.

It is not recommended that the staff attorney or the Council itself commit resources to tracking pending legislation affecting the courts. Given the sheer volume of legislation that potentially affects the administration of the judiciary, it would be impossible to undertake the task. Further, the Director of State Courts has been given the responsibility for tracking legislation by the Supreme Court and has dedicated full

³¹ The Judicial Council has *de facto* liaisons with key stakeholder organizations, given its membership. To the extent necessary, and to the extent that the staff attorney's priorities limit the ability to establish staff liaisons with stakeholder organizations, the Council can continue to rely on its membership. Where no existing liaison relationship exists, the Council could appoint one of its members as formal liaison, as it has done with the appointment of a member as a liaison to the Supreme Court's Planning and Policy Advisory Committee.

time staff to the task of tracking legislation and evaluating the potential impact of selected legislation on judicial operations. In the alternative, the Council's staff attorney can establish a liaison relationship with the legislative staff of the Director of State Courts Office.