

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 17, 2012

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

MEMBERS PRESENT: Vice Chair Rebecca R. St. John, Christine Rew Barden, William Gleisner, Cathlene Hanaman, Catherine A. La Fleur, Representative Jim Ott, Honorable Gerald P. Ptacek, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner.

MEMBERS EXCUSED: Chair Thomas W. Bertz, Honorable Patricia S. Curley, Allan M. Foeckler, Honorable Mark Mangerson, Honorable Maxine A. White, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney.

I. Call to Order, Roll Call and Introductions

Vice Chair St. John called the meeting to order at 9:35 a.m.

II. Approval of December 16, 2011 Minutes

Council member Stephens noted an extra “to” on page 4, first paragraph, line 5.

MOTION: Council member Ptacek moved, seconded by Council member Gleisner, to approve the December 16, 2011 meeting minutes as amended. Motion approved unanimously.

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

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 noted that several items discussed at the previous meeting require follow-up. First, there was a request to consider drafting a statute to give judges explicit authority to defer the entry of judgment. While this is common practice, some judges question whether they are authorized to do so under current law. Council member Schultz will prepare a draft for Council review. Second, the current provision (s. 970.10) in the draft bill regarding a prosecutor's motion to dismiss does not accurately reflect the intent of the drafting committee. The committee intended that the defendant's consent would only be necessary after jeopardy attaches, but the draft requires the defendant's consent at any stage of prosecution. Council member Schultz distributed a memo dated January 19, 2012, containing the proposed revision to require the defendant's consent only after the trial has commenced. Council member Schultz also clarified that prior to commencement of trial, the dismissal is without prejudice.

MOTION: Council member Stephens moved, seconded by Council member Wagner, to accept the proposed amendment, as contained in the January 19, 2012 memo. Motion approved unanimously with Council members Roggensack and Ott abstaining.

The Council resumed discussion of the items addressed in the memo previously distributed to members and dated October 28, 2011, regarding significant changes and new provisions contained in the draft bill. At the previous meeting, the Department of Justice's (DOJ) representative requested that action on s. 971.57 be deferred to allow DOJ to further evaluate the proposed provision. Discussion resumed regarding s. 971.57, non-testimonial discovery from third parties. Council member St. John reported several concerns with the provision. However, she noted that these concerns do not reflect DOJ's official position. They are comments received from individual attorneys at DOJ. The concerns include the following: the provision creates an almost unlimited new power of the courts over third parties without any safeguards; it may present a separation of powers issue; it only empowers the defendant, but not the prosecution with authority to seek discovery from third parties; and uncertainly as to why the provision is necessary.

Council member Schultz addressed the concerns by explaining that the procedure involves a motion to the court. The provision will apply to a limited number of procedures such as fingerprints, line-ups, or other identification information. Before the court may grant the motion, the court must find that there is probable cause to believe that another individual committed the crime, the evidence is necessary to the defense, and the evidence cannot be obtained by other means. This is a very high standard to meet. It also allows a motion to quash by the third party in question. Therefore, this procedure provides adequate safeguards. The provision does not extend to the prosecution because law enforcement already has the ability to arrest and identify individuals when there is probable cause. This provision was originally proposed as a partial substitute for some things that could have been done through the preliminary examination. More recently, many Innocence Project cases have revealed that a leading problem in wrongful conviction cases is "tunnel vision" by law enforcement (i.e. investigations focused on only one suspect can lead to the exclusion other possibilities).

Council member Schultz noted that s. 971.66 specifies that a motion to dismiss on grounds that a statute is unconstitutional must also be served on the Attorney General. This is consistent with current law, and specifically stating it in the statute will provide clarity. However, the draft bill alters the original proposal slightly by simply using the term "unconstitutional" as opposed to specifying "violates the United States or the Wisconsin Constitution." Council member Schultz recommended restoring the original, more specific language.

MOTION: Council member St. John moved, seconded by Council member Stephens, to accept the proposed amendment to specify "violates the United States or the Wisconsin Constitution." Motion approved, with Council member Shriner opposed and Council members Roggensack and Ott abstaining.

Sec. 971.68 addresses joinder and severance motions. The LRB drafters had a question regarding the accuracy of the cross-reference in this section. Council member Schultz stated that

the cross-reference is correct. The primary purpose of the change in s. 971.68 is to codify remedies for the *Bruton* situation (co-defendants on trial but evidence is only to be considered as to one defendant).

Sec. 972.075 codifies the standard practice regarding allowing jurors to ask questions of witnesses, at the judge's discretion. There is currently no statutory process regarding this practice.

Sec. 972.19 defines a stipulation as an agreement between the parties that is or shall be taken as established. Currently, stipulations are used loosely. This provision is intended to bring order to the process and requires that if the stipulation is accepted, the court shall put it in the record. If it is a jury trial, the jury is to take the stipulated facts as conclusively proved. If a stipulated fact establishes an element of the crime, the defendant must waive a jury trial as to that element.

Secs. 972.24 (return of the verdict), 972.25 (poll of the jury), and 972.26 (accepting the verdict) break the process out into steps to clarify the procedure and the proper order. Current law does not require a jury poll in every case so this is a change from current law. The Council discussed problems under current law. Council member Stephens noted that one of the biggest problems under current law is that these steps are not done in the correct order. The drafting committee believed that if the process was clarified, it may reduce the number of appeals. Council member St. John inquired as to whether this would impact the harmless error analysis. Council member Schultz does not believe this change will alter the current standard of review.

Council member Schultz noted that s. 974.08 (1), defendant's presence at post-conviction proceedings, was modified by the LRB drafters. The original proposal stated, "...and those issues are supported by more than mere allegations." It was revised by the LRB to read, "...and the defendant presents those issues through more than mere allegations." Council member Wagner suggested that the original language provides the court with more guidance.

MOTION: Council member Wagner moved, seconded by Council member La Fleur, to accept the proposed amendment to specify "...and those issues are supported by more than mere allegations." Motion approved unanimously with Council members Roggensack and Ott abstaining.

Council member Ptacek inquired as to whether "presence" is defined. Current practice includes the use of an appearance by telephone. Sec. 967.13 lists proceedings at which the defendant has a right to be present, and s. 967.14 provides a list of proceedings that may be conducted by telephone. Council member Schultz stated that the drafting committee elected not to define "present." Council member Roggensack reported that there is a case currently pending in the supreme court regarding what "present" does or does not require. She suggested that it would be helpful to codify and/or clarify the concept of "present."

MOTION: Council member Shriner moved, seconded by Council member Ptacek, to direct the Criminal Procedure Committee to study the issue of presence and provide a recommendation regarding whether a definition should be incorporated into the statutes. Council member Shriner

specified that a recommendation is not requested for incorporation into the current draft bill, but should be studied for future consideration. Motion approved unanimously with Council members Roggensack and Ott abstaining.

Council member Schultz explained that the remaining changes in the bill are for clarification and reorganization. He stated that the drafting subcommittee's next task is to address the remaining comments and questions from the LRB drafters. He will report back to the Council if any of those notes raise issues that require further discussion and direction.

The Council discussed a legislative timeline for introduction of the bill. Council member Ott noted that the current legislative session is nearing its end, and recommended that the Council be prepared to introduce the bill in January to improve its chance of passage. The Council discussed the importance of the LRB analysis, as well as a fiscal analysis. Council member Ott offered to assist with obtaining additional information on the process to complete the fiscal analysis.

MOTION: Council member Stephens moved, seconded by Council member Ptacek, to approve all the remaining provisions contained in the October 28, 2011 memo and discussed by the Council at today's meeting. Motion approved unanimously with Council members Roggensack and Ott abstaining.

IV. Discussion and/or Action Regarding Approval of Supreme Court Rule Change Petition Amending Wis. Stats. §§ 804.01, 805.07 and 905.03 to Address Inadvertently Disclosed Information

Attorney Southwick previously provided members with a draft supreme court rule change petition and supporting memorandum to amend Wis. Stats. §§ 804.01, 805.07 and 905.03. The proposal amends s. 804.01 (2) (c) to include work product in the protections covered by the new inadvertent disclosure provisions. Sec. 804.01 (7) is a new provision to add a rule based on the federal clawback rule. The proposal creates a process for a producing party to seek the return of privileged information inadvertently produced during discovery. It also adds a process for the requesting party to obtain a court ruling on the privilege claim. Sec. 805.07 (2) (d) extends the clawback procedure to information inadvertently produced pursuant to a subpoena. Sec. 905.03 (5) addresses the impact of inadvertent disclosure on the attorney-client privilege, and provides guidance for determining whether the disclosure will result in a forfeiture of the privilege. It is based on Federal Rule of Evidence 502.

Attorney Southwick reminded Council members that this proposal is a follow-up to the previously adopted rules for the discovery of electronically stored information (e-discovery). At the public hearing on the Council's e-discovery petition, the court asked about the issue of clawback and inadvertent disclosure. The Council's representatives at the hearing indicated that the issue was being studied and the Council would follow up with a second petition to address it in part through an amendment to the discovery rules, but also with a proposed amendment to the rules of evidence to address the question of forfeiture of privilege.

Council member Roggensack asked whether the language in the petition mirrors the language in the federal rules. Attorney Southwick stated that it generally does mirror the federal counterparts. A comparison between the federal rules and the proposed Wisconsin rules can be found in the appendix to the supporting memorandum. Attorney Southwick noted that the only significant difference can be found in s. 905.03. FRE 502 references a "waiver," while the same result is termed a "forfeiture" under the proposed s. 905.03 (5) due to the distinction between waiver and forfeiture in Wisconsin case law such as *State v. Ndina*, 2009 WI 21. Council member Roggensack expressed concern with reliance on *Ndina* in light of subsequent case law on the issue of waiver and forfeiture.

MOTION: Council member Stephens moved, seconded by Council member Gleisner, to approve the petition and supporting memorandum for filing with the court. Motion approved unanimously with Council members Roggensack and Ott abstaining.

VI. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the Appellate Procedure Committee did not meet last month, but the committee is scheduled to meet today following the regular Council 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 did not meet last month and is not scheduled to meet today. However, Committee member Leineweber is working on a draft proposal to codify the holding in *Alt v. Cline*, 224 Wis.2d 72, which basically created a privilege permitting experts to refuse to testify in certain circumstances. The committee expects to review the proposal next month.

VII. Other Business

A. PPAC Liaison's Report

Council member Wagner reported that PPAC continues to work on strategies for justice. At the last meeting, research was presented by the National Center for State Courts on the topic of evidence-based sentencing.

B. Assembly Judiciary Committee Report

Council member Ott stated that Assembly Bill 399 was sent to the Judiciary Committee. The bill basically adopts the 2005 Uniform Foreign-Country Money Judgments Recognition Act approved by the Uniform Law Commission. He asked for feedback on the bill because its

adoption appears to place a mandate on Wisconsin courts. He noted that the bill has been amended to except tribal courts from the definition of foreign court. Members discussed concerns such as specific directives in the bill regarding when a judge “shall recognize” and “may not recognize” a foreign money judgment, removing judicial discretion. It places a burden on Wisconsin judges to determine which foreign legal systems comply with our notions of due process. It also potentially places a great burden on the debtor to introduce proof regarding the foreign judicial system.

C. Council Attorney’s Report

Attorney Southwick reported that the Governor has made an appointment to fill the district attorney position on the Council. She introduced Waukesha County District Attorney Brad Schimel as the Council’s newest member.

1. Discussion Regarding Rule Procedures Committee Report on Supreme Court’s Rule Making Function

Attorney Southwick explained that the Wisconsin Supreme Court appointed a study committee last year to look at the court’s rule making function and the rule petition process. Former Judicial Council Chair Beth Hanan served on the committee. The committee issued a report and its recommendations. Attorney Southwick distributed a copy of the report to members prior to the meeting, along with the court’s notice regarding a March 5th public hearing. Written public comments are due to the court by February 24, 2012. Attorney Southwick explained that the report contains a number of recommendations that could alter the rule change petition process. Since the Council regularly files rule change petitions, she asked whether the Council would like to submit written comments or designate an individual to testify at the public hearing. Members discussed the various options proposed in the report.

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to direct Attorney Southwick to draft a letter to the court in support of the proposals contained in the report to modify the court’s existing rule-making procedure. Motion approved unanimously with Council members Roggensack and Ott abstaining. Council member Wagner added a request that Attorney Southwick attend the March 5th public hearing, if she’s available.

VIII. Adjournment

The Council adjourned at 11:30 a.m.