

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
April 20, 2012

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

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

MEMBERS EXCUSED: Allan M. Foeckler, Cathlene Hanaman, Honorable Mark Mangerson, A. John Voelker, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sandy Lonergan, Wisconsin State Bar; Theresa Owens, Office of the Chief Justice; Diane Fremgen, Supreme Court and Court of Appeals Clerk .

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:40 a.m. and introduced Diane Fremgen, the new Clerk of the Wisconsin Supreme Court and Court of Appeals.

II. Approval of March 16, 2012 Minutes

MOTION: Council member Schultz moved, seconded by Council member Stephens, to approve the March 16, 2012 meeting minutes with an amendment to add Council member Schimel to the list of members present at the meeting. Motion approved unanimously.

III. Appointment of Nominating Committee

Chair Bertz announced that he is seeking three volunteers for a committee to nominate members to serve as the chair and vice chair of the Judicial Council for the 2012-2013 meeting year. He asked anyone interested in serving on the committee to please contact Attorney Southwick. Attorney Southwick will also send out an email notice.

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

Council member Schultz reported that the Criminal Procedure Workgroup (Council members Schultz, Stephens and St. John) met twice to review the draft bill, prepare responses to the notes from the Legislative Reference Bureau (LRB) drafting attorneys, and respond to questions and comments received from individual attorneys with the Department of Justice (DOJ). Attorney Southwick circulated a memo dated April 19, 2012, highlighting the additional

amendments to the draft bill that the workgroup recommended. Council member Schultz led a discussion regarding the recommendations.

Council member Schultz noted that in particular, the workgroup requested that the Council discuss and act on the proposal regarding suspended prosecution agreements, and the dismissal and replacement of jurors during deliberations. Council member Schultz explained that many of the other recommendations from the workgroup simply ask the LRB to restore current law, or favor the adoption of the language used in the Council's original draft.

Council member Schultz noted that the draft of s. 968.025 (4) removes specific language regarding juries of six contained in current law and included in the Council's original proposal. The workgroup recommended revising the first sentence in sub. (4) (a) to state, "If the inquest is to be conducted before a jury, the jury shall consist of 6 jurors."

The workgroup recommended retaining current law in s. 968.29 - .30 relating to wiretaps, and electronic surveillance. These are highly technical statutes, often based on federal models. Attorney Southwick explained that when the LRB revises a statute, the drafter may make additional amendments to comply with current LRB drafting standards. That appears to have happened in a number of areas of the criminal procedure code. In a few provisions, modifying the drafting style also causes unintended changes to the meaning of the statute. To the extent the workgroup encountered stylistic changes made by the LRB that potentially alter the meaning of the statutes, members recommended restoring the language in current law. Council member Schultz cautioned against assuming the burden of justifying amendments that the Council did not study and recommend.

Council member Stephens noted that the stylistic changes were often the result of the LRB changing a provision from passive voice to active voice, which can sometimes cause an unintended change in meaning. For example, in s. 968.465 (4) the draft was amended to require that "the judge" shall act with secrecy when the provision was intended to require that all involved with the application and issuance of the search warrant must act with secrecy. The workgroup recommended restoring the original proposal: "A search warrant shall be issued with all practicable secrecy..." Sub. (5) contains a new provision regarding sealing a warrant. The workgroup recommended including statutory authority to alter the time period as follows: "A judge may order that a search warrant and supporting documents be held under seal for a specified period of time and may extend or reduce the period for good cause shown." Council member Blanchard asked whether the recommendation complies with the standard established by case law. Attorney Southwick responded that the next sentencing in that subsection contains the applicable balancing test.

LRB deleted s. 968.475 (3) on the assumption that it simply provided instruction regarding where to look for something else in the statutes and therefore did not add anything of substance. The workgroup disagreed because post- *Zurcher v. Stanford Daily*, documents possessed by innocent third parties must be obtained with a subpoena, not a search warrant. The workgroup recommended that the following proposed sub. (3) should be restored in the bill:

(3) Documents under the control of a person not reasonably suspected to be concerned in the commission of a crime under s. 939.05(2) may be subpoenaed under s. 968.705.

Council member Schimel specifically approved of this as a very practical provision because prosecutors and judges are not always aware of the distinction when an innocent third party is involved.

Council member Schultz explained that the Judicial Council previously requested that the workgroup draft additional language granting courts specific statutory authority to withhold entry of judgment when there is a suspended prosecution agreement. The workgroup recommended amending s. 970.15 (3) to include the following sentence: “The court’s authority to suspend prosecution includes the authority to defer or delay the acceptance of a plea or to withhold entry of judgment.” Council member Schimel noted that specifically granting this flexibility will be useful, especially as more problem-solving courts are developed. Members discussed whether the statute should require a written agreement, and agreed that it can be addressed by local rule or scheduling order because it may not be necessary in every case.

Sec. 971.09 (5), Consolidation, addresses which jurisdiction will be responsible for costs. The draft deleted this subsection. The workgroup recommended that it be restored and placed at the end of the section as sub. (7).

Sec. 972.04 (4), Jury selection, currently reads: “The court shall order the parties to disclose the identity of potential witnesses during jury selection if knowledge of the identity of potential witnesses is necessary for selection of an impartial jury.” The current draft places the burden on the court to issue an order. It would be more efficient to place a statutory burden on the parties, so the workgroup recommended revision of sub. (4) as follows: “The parties shall disclose the identity of potential witnesses during jury selection if knowledge of the identity of potential witnesses is necessary for selection of an impartial jury.” Members generally agreed that the provision is confusing and questioned its usefulness.

MOTION: Council member Ptacek moved, seconded by Council member White, to delete this provision from the bill draft. Motion approved with Council member Stephens opposed and Council member Ott abstaining.

Sec. 975.30 (3) Competency, currently reads, “The fact that a defendant is not competent to proceed does not preclude the court from proceeding on any pretrial motion that is susceptible to fair determination without the personal participation of the defendant.” The workgroup recommended retention of current law, including the reference to s. 971.31 (which becomes s. 971.65, pretrial motions, in the draft bill), as follows: “The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant.”

Sec. 975.33 (1), Examination report, currently reads, “...A report required under s. 975.32 (6) shall include all of the following: ...” The workgroup recommended restoration of

the following language from the original Council draft: “Each court-appointed examiner shall submit to the court a written report which shall include all of the following: ...” The recommended language clarifies that reports may be ordered at different times and each report must meet all of the specifications. Also, sub. (2) contains the term “immediately.” The workgroup recommended changing the term to “forthwith” to maintain the language found in current law.

Sec. 975.52 (2)(c)1., Trial of actions upon plea of not guilty by reason of mental disease or defect, draft bill eliminates language allowing jurors to determine plea even if some are no longer able to serve. Workgroup recommended that the Council restore current law, as follows: “If one or more jurors who participated in determining the first plea become unable to serve, the remaining jurors shall determine the 2nd plea.”

Sec. 975.57 (1), Commitment, the draft currently reads, “The court shall order institutional care only if it finds by clear and convincing evidence . . .” The workgroup recommended that the Council revise the provision to strike “only.”

MOTION: Council member Stephens moved, seconded by Council member Shriner, to approve the changes recommended by the Criminal Procedure Committee Workgroup and contained in the memo from Attorney Southwick with the exception of the deletion of s. 972.04 (4) and the *Lehman/Avery* issue. Motion approved unanimously with Council member Ott abstaining.

Council member Schultz explained that the workgroup would like the full Council to determine how best to proceed with the *Lehman/Avery* issue regarding dismissal of additional jurors and substitution of jurors. It is not addressed in the current bill draft. In both the *Lehman* and *Avery* cases, a juror was dismissed during deliberations. In *Avery*, an alternate juror had not been dismissed and had been sequestered. The judge allowed the sequestered alternate juror to substitute for the dismissed juror, with the consent of both parties. The statute regarding alternate jurors states that they are to be dismissed at the time the cause is submitted to the jury. That process was not followed in either *Lehman* or *Avery*, but both courts allowed it. Current law does not instruct the court on a process when alternate jurors are not dismissed when the case is submitted to the jury. Current law also does not address whether, when or how to substitute an alternate juror once deliberations have begun. The proposed draft does not allow substitution of an alternate juror. The workgroup felt that the rule should be consistent with *Avery* and the federal rule that allows substitution (both of which were adopted after the committee prepared the original draft upon which the bill is based). However, the workgroup identified a number of issues to consider when drafting a rule addressing *Lehman* and *Avery*, and felt that the issue should be further studied and addressed by the full Council. Council member Shriner proposed that the issue should be studied and addressed to reduce the likelihood of mistrials. Attorney Southwick distributed a research memorandum on the *Lehman/Avery* issue and proposed that the full Council study it and address it at the May and June meetings. Council member White requested additional research regarding federal case law. Attorney Southwick will distribute that information prior to the next Council meeting. Members agreed by consensus to study the issue and discuss it further at the next meeting.

V. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the Appellate Procedure Committee met last month and received an interim report from the Council's research assistant. She presented the first phase of her research regarding how other jurisdictions address the precedential value of partially overruled court of appeals decisions.

The Legislative Reference Bureau has completed the analysis for the bill amending the statutes regarding presentence investigation reports. Council members Stephens and St. John will review the analysis for accuracy and completeness.

At last month's meeting, the committee continued to discuss protecting the identity of victims in appellate documents that are publically available via the internet. The committee will continue to work on that issue at today's meeting. The Council's research assistant will also present the next phase of her research regarding how other jurisdictions address the precedential value of overruled decisions.

B. Criminal Procedure

Committee Chair Schultz had no further report. Attorney Southwick extended a special thanks to the workgroup (Council members Schultz, Stephens and St. John) for all the extra hours they devoted this month to complete the final review of the draft bill and prepare recommendations.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee met last month and began discussing 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 continue its review and discussion of the proposal at today's meeting. The committee will also resume its discussion of s. 906.09, impeachment by prior conviction. This issue was referred back to the committee by the full Council at last month's meeting. Professor Dan Blinka, Marquette University Law School will attend the meeting as a special guest to share his thoughts regarding the *Alt* issue and s. 906.09 (1). If time permits, the committee will introduce its newest project: Wisconsin's class action statute.

VI. Other Business

A. PPAC Liaison's Report

Council member Blanchard reported that PPAC continues to discuss the National Center for State Courts Effective Justice Strategies Research Project, including research on evidence-based practices and problem-solving courts. He also noted that the rule change petition regarding amendment of SCR 60.04(1)(g), relating to ex parte communications in treatment courts has been set for a supreme court public hearing. Council member Ptacek noted that

treatment courts require a higher degree of collaboration between the judge, the parties, and the treatment providers so the traditional adversarial court model requires modification for the treatment courts to be effective.

B. Council Attorney's Report

Attorney Southwick reported that she has begun planning for the Council's June meeting. The June meeting is the Council's final meeting of the year, and former Council and committee members are invited to attend. It is a time to thank those who have worked on Council projects over the years, recognize out-going members, and discuss current and potential projects with other members of the legal community. The meeting is scheduled for June 15th, the Council's regular meeting date. Attorney Southwick has reserved the Assembly Parlor for the event and updated the contact information for the guest list.

Council member Ott requested that the Council set aside a few minutes at the next meeting to provide feedback on proposed OWI legislation and its potential impact on the justice system. Council member Wagner noted that the Council's statutory directive is primarily to provide recommendations regarding procedural matters, not substantive criminal laws. Attorney Southwick suggested that the topic can be placed on the agenda as a report from the Assembly Judiciary Committee Chair, for discussion only. Council member Wagner noted that the District Attorneys Association's annual meeting is in June and they would likely be able to offer feedback on the issue. Council member White suggested that the court's legislative committee could provide feedback, as well. Council member Schultz suggested that although drafting OWI legislation may not fall within the Council's statutorily assigned duties, that doesn't necessarily preclude the Council from being able to discuss the topic and offer comments. Judicial members expressed concern that participating in discussions involving amendments to substantive laws has the potential to create a conflict of interest. Chair Bertz noted the concern and stated that the issue will be on the next agenda as a report item.

VII. Adjournment

The Council adjourned by consensus at 11:25 a.m.