

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

The Judicial Council met at 9:30 a.m. in the Assembly Parlor, Second Floor West, State Capitol, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair Thomas W. Bertz, Vice Chair Rebecca R. St. John, Michael R. Christopher, Honorable Edward E. Leineweber, Cathlene Hanaman, Honorable Gerald P. Ptacek, Professor David E. Schultz, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

**MEMBERS EXCUSED:** Christine Rew Barden, Allan M. Foeckler, William Gleisner, Catherine A. La Fleur, Honorable Patricia S. Curley, Representative Jim Ott, Honorable Patience Roggensack, Thomas L. Shriner, Senator Rich Zipperer.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; Theresa Owens, Office of the Chief Justice; Michelle Cern, Supreme Court Policy Analyst; Lucas Vebber, Office of Senator Zipperer; Professor Meredith Ross, University of Wisconsin Law School; Jennifer Andrews, Court of Appeals Chief Staff Attorney; Sandy Lonergan, State Bar of Wisconsin.

**I. Call to Order, Roll Call and Introductions**

Chair Bertz called the meeting to order at 10:05 a.m.

**II. Council Attorney's Report**

Attorney Southwick gave a brief presentation describing the Council's history, organization, statutory duties, and process for conducting its work. She also reminded members of their responsibilities under the open meetings and public records laws.

**III. Approval of June 17, 2011 Minutes**

MOTION: Council member Stephens moved, seconded by Council member Christopher, to approve the June 17, 2011 meeting minutes. Minutes were approved unanimously without amendment.

**IV. Discussion and/or Action Regarding Recommendations from the Appellate Procedure Committee Regarding Presentence Investigation Reports**

At the June 17, 2011 meeting, the Council approved a draft of the recommended amendments (dated June 8, 2011) regarding presentence investigation (PSI) reports. Three provisions in the draft were referred to the committee for further study. The committee was also tasked with drafting Judicial Council Committee notes that will be recommended for publication.

The Appellate Procedure Committee met over the summer and prepared a revised draft, consistent with Council direction. Prior to the meeting, Council members were provided with a copy of the revised draft, dated August 18, 2011, for their review. Council member Stephens noted that the revisions reflect that only unrepresented defendants will be provided a draft PSI report to review prior to the sentencing hearing. Consistent with the Council's previous discussion, represented defendants are expected to review the report with defense counsel. The committee confirmed that "days" (as opposed to "calendar days") is the correct term in Wis. Stat. § 975.15 (2). The committee revisited the initial applicability provision and recommended its deletion because the amendments should apply to all subjects of PSI reports.

Council member Stephens explained that *ad hoc* committee member Jenny Andrews, Court of Appeals Chief Staff Attorney, identified a gap in the rules regarding access to the PSI materials by unrepresented defendants, and specifically, pro se defendants pursuing a Rule 809.30 appeal. Section 972.15 (4r) (d) only addresses a pro se defendant in a "collateral post-conviction proceeding." The proposal, in par. 809.15 (1) (am) and 972.15 (4r) (b), required the circuit court clerk to serve a copy of the PSI material "on the parties when requested under s. 809.30 (2) (e) or (f)." Proposed par. 972.15 (4) (b) requires confidentiality except as provided in sub. (4r). Par. (4r) (b) instructs the clerk to serve the materials on the defendant. Section 809.15 (6) states, "If a defendant is not represented by an attorney, the defendant may request and the court of appeals shall specify the manner in which the defendant shall have access to the presentence investigation materials so as to allow meaningful and timely review of the materials." To resolve the potential problem of a pro se defendant's receipt of a copy of the PSI materials, the committee agreed that a similar provision should be added to s. 972.15 to clarify that an unrepresented defendant's access is governed by par. (4r) (d), without limitation to collateral post-conviction proceedings. The committee recommended that the provision state, "in any appeal, post-conviction or collateral proceeding..." The committee also recommended a reference to par. (d) in par. (b), and elimination of the cross-reference to s. 967.06.

Council member Stephens explained that the committee also reviewed the working notes to determine which notes should be redrafted and recommended for publication. Working notes from the committee to the Council were generally deleted. The notes that were deemed helpful to the courts and practitioners were retained, but many were revised for purposes of brevity.

**MOTION:** Council member Stephens moved, seconded by Council member Wagner to approve the draft dated August 18, 2011. Attorney Southwick noted that in s. 972.15 (5) (a) and (6), "final" should be under-scored to show that it is added text. Motion approved unanimously.

Council member Stephens recommended that the Appellate Procedure Committee work with Attorney Southwick and the Legislative Reference Bureau to have the recommendations drafted in bill form.

## **V. Discussion Regarding Proposed Amendments to the Rules of Criminal Procedure**

Council member Schultz explained that the final set of questions from the LRB drafters is still awaiting Council response, although he does not anticipate that any of those issues will substantially impact the substance of the draft that has been circulated to members for review.

Attorney Southwick asked for suggestions from members regarding the process for discussion and review of the draft bill by the Council as a whole. Council member Schultz noted that due to the draft bill's large size, it presents some unique challenges. Although many of the recommendations are not controversial and have to do with technical changes and reorganization, some provisions do present policy considerations. The draft has been reviewed by many groups including defense lawyers, prosecutors and judges. He asked for guidance from the Council regarding a time table or suggested process for review of the draft.

Council member Christopher suggested that Council member Schultz and Attorney Southwick draft a memo regarding the amendments that present significant policy considerations. Vice Chair St. John asked for Council consideration regarding the level of detail council members desire for the discussion of the proposed amendments. She asked whether discussion of the major policy items would be sufficient. Alternatively, Attorney Southwick asked whether members would like to break the discussion down by chapter. Council member Leineweber felt that both would be appropriate, and suggested that the Council begin by discussing the policy issues and then take up the draft one chapter at a time.

Attorney Southwick reminded members that while it is very important for the Council to conduct a thorough review of the draft, it has already gone through years of drafting and revisions by both the Criminal Procedure Committee and the Legislative Reference Bureau, so members are not expected to focus on each word choice. She suggested that redrafting at the table is not appropriate. Attorney Southwick asked that if members have suggested changes to the language used in the draft, they should submit proposed changes to her in writing in advance of the meetings so that she can prepare copies for everyone to review during the meeting. Council member Ptacek agreed, and noted that the Council really needs to focus its time on addressing the policy changes.

Council member Stephens suggested that Attorney Southwick modify the May 2011 memo drafted by Council member Schultz by inserting references to the portions of the draft that contain the described policy changes. She stated that she would be comfortable with discussion and approval of only the major policy changes. Council member Wagner agreed, and suggested that if members have concerns about a particular policy, they should notify Attorney Southwick in advance of the meeting so that she can plan to spend additional time discussing that topic.

Members generally discussed timing and the process for introducing the bill, including securing legislative sponsors. Chair Bertz stressed the importance of obtaining bipartisan support from legislative leaders.

Attorney Southwick will work with Council member Schultz to prepare a memo regarding the portions of the bill that will be discussed at next month's meeting. She asked

members to notify her in advance if they have particular questions or concerns with any sections to be discussed so that she can prepare to address those issues in more detail at the meeting.

## **VI. Discussion Regarding Limited Scope Representation**

Prior to the meeting, Attorney Southwick provided members with a copy of the PPAC limited scope representation subcommittee's final report. She reminded members that the Appellate Procedure Committee was asked to identify and study issues raised by limited scope representation, and specifically ghostwriting, at the appellate level. The committee coordinated its efforts with the PPAC subcommittee. She reported that PPAC accepted the subcommittee's recommendations and requested that they begin drafting the recommended rules. At this time, there has been no request for assistance from the Council. Michelle Cern, one of the staff members working with PPAC on the project, was present. She stated that a committee is currently being appointed to work on the rule drafting. Council member Voelker asked fellow Council members to contact the committee if they have concerns or questions regarding any of the recommendations in the report.

## **VII. Committee Reports**

### **A. Appellate Procedure**

Committee Chair Stephens reported on the current membership of the committee, and invited interested members to join the committee. She reported that the committee will meet later today following the Judicial Council meeting. The committee will discuss potential future projects so that they can provide informed comments to the full Council when the projects are considered for acceptance.

### **B. Criminal Procedure**

Attorney Southwick announced that the committee is seeking new members. She asked interested members to please contact her or Committee Chair Schultz. Council member White suggested that either she or Council member Ptacek should join so that the Council has at least one judge serving on each of its committees.

### **C. Evidence and Civil Procedure**

Committee Chair Leineweber reported that the Evidence & Civil Procedure Committee met throughout the summer. Members continued to study Wis. Stat. § 906.09, impeachment by prior conviction. At the meeting later today, members will discuss public comments received regarding the draft proposal to amend Wis. Stat. §§ 804.01 and 905.03, inadvertent disclosure and privilege waiver.

**VIII. Other Business**

**A. PPAC Liaison's Report**

There was no PPAC report.

**IX. Adjournment**

The Council adjourned at 11:00 a.m.