

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 18, 2011

The Judicial Council met at 9:30 a.m. in Lubar Commons, 7th Floor, Law Building, University of Wisconsin Law School, Madison, Wisconsin.

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

MEMBERS EXCUSED: Honorable Patricia S. Curley, Allan M. Foeckler, A. John Voelker, Honorable Maxine A. White, Senator Rich Zipperer.

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

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:35 a.m. and introduced new Council member Judge Mark Mangerson, Oneida County Circuit Court.

II. Approval of October 21, 2011 Minutes

MOTION: Council member Roggensack moved, seconded by Council member La Fleur, to approve the October 21, 2011 meeting minutes. Minutes were approved unanimously with two minor typographical errors noted, and a request by Council member Stephens to delete the word “shared” from line 9, ¶ 2 of section IV.

III. 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 circulated the draft rule change petition to amend ss. 804.01, 805.07 and 905.03, but explained that she is still writing the supporting memorandum. Council member Roggensack requested that the Council have another discussion regarding the proposal prior to filing the petition, but suggested that it may be helpful to wait until the memorandum is complete.

MOTION: Council member Shriner moved, seconded by Council member Stephens, to table this item. Motion approved unanimously. Attorney Southwick will agenda it when the memorandum is completed.

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

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

Council member Schultz explained that currently a defendant with charges in more than one county can seek to have them resolved in a single county. However, the drafting committee determined that current law is difficult to understand so the process is not employed as frequently as it should be used. For example, current law does not contain the term "consolidation," so these provisions are difficult to find. On several occasions, the supreme court has also suggested that the current consolidation procedure needs to be reviewed. In the proposed bill (s. 971.09), the provisions regarding consolidation of charges from more than one county are modified to make the rules more accessible and easier to understand. The committee believes that encouraging the use of this process will result in cost savings for the justice system because it will reduce the need to transport defendants back and forth between counties for court appearances.

Council member Shriner asked how consolidation is initiated. Council member Schultz explained that consolidation of charges must be initiated by the defendant and approved by the district attorneys in the counties where the charges are pending. Council member Schultz added that the proposal makes the new rules more flexible to encourage use by defendants. One problem under the current statute is that it requires an admission of guilt. The proposal allows the defendant to use the consolidation process to enter a plea of guilt or no contest. Also, the proposal allows consolidation by defendants in custody, as well as those who have been released on bail.

Council member Schultz noted that many of the drafting committee's original comments to the proposed changes would be helpful to practitioners. The Council discussed incorporating them into the proposed amendments as Judicial Council Committee Notes, as found in many other statutes drafted or revised by the Judicial Council.

Council member Schultz stated that the drafting committee spent a lot of time revising the John Doe procedures. However, the legislature amended the procedures in 2009 and incorporated many of the changes that the committee intended. Council member Schultz proposed that the Council take no further action with regard to amending these provisions.

The proposal reorganizes the discovery rules to break up extremely long statutes into a series of smaller statutes that are easier to find and understand. There are also a few new statutes proposed to codify current practice. The proposal adds s. 971.42, which is not substantive, but explains the purpose of discovery. This provision is based on the American Bar Association (ABA) Criminal Discovery Standards.

Council member Mangerson noted that s. 971.43 might change practice in some smaller counties that currently do not conduct formal pretrial conferences. He supported the change

because it will require pretrial conferences or the inclusion of deadlines in scheduling orders, which will encourage better case management.

The Council discussed the discovery process and the points in time at which it is to occur. The proposal encourages early exchange of discovery to promote prompt resolution of the case. The production requirements for both the prosecutor and defense are broken up into separate statutes with captions to make them easier to find. Sec. 971.49 contains a new provision regarding motions to obtain evidence before trial. This creates a procedure by which a party can obtain specific discoverable information that is not otherwise addressed in the statutes.

The committee discussed the newly proposed or amended discovery provisions. Council member Schultz explained that s. 971.46 clarifies the process for calling expert witnesses. Sec. 971.48, testing and preservation of evidence, contains a new provision regarding the destruction or transfer of material and requires notice. Sec. 971.50, continuing duty to disclose, is contained in current law, but it has been moved to a separate statute to make it more prominent and easier to find. Sec. 971.51 is a new provision that creates a process for disclosure of discoverable material, and it is based on the ABA Criminal Discovery Standards. Sec. 971.52 contains a new provision that requires disclosure if any material is withheld for privilege or other reason related to confidentiality. The court may require the deleted information to be furnished to the court under seal. If the court determines that the material is exempt from disclosure, a sealed copy of the material must be retained in the court record. This provision is intended to create a more complete record for review if the issue is challenged on appeal. Sec. 971.53 is current law, but it has been moved to its own provision to make it easier to find. Sec. 971.54 is based on current law, but it has been expanded to include evidence, in addition to witnesses. Sec. 971.55 is current law, but it has been moved to make it easier to find. Secs. 971.56 and 971.57 are both new provisions modeled on the ABA Discovery Standards, and they are based on the premise that courts can order the production of non-testimonial evidence.

The Council discussed the amendments to the bail provisions in chapter 969. Council member Schultz explained that the provisions were primarily reorganized. He noted that the "bail" and "bond" definitions were placed in ch. 967 by the LRB drafter because those two terms are used in other chapters. The proposal defines terms and lists the ways in which a defendant's appearance in court can be secured. These changes are intended to achieve consistency in the terminology that is used throughout the state. Secs. 969.30-.43 generally reorganize current law and break it into separate subsections to make it easier to find. Sec. 969.32 is a new provision identifying the various types of release. It codifies current practice. Sec. 969.33, conditions of release, is basically current law but consolidates the conditions for both felonies and misdemeanors to eliminate duplication. Sec. 969.34 adds a reference to the "bail schedule," which is how it is referenced in practice, although that terminology is not found in current law. Sec. 969.35, release upon arrest in another county, is based on current law, but it has been clarified and made easier to locate. Council member Mangerson stated that this is often being done electronically now, but he did not believe the proposal would have any adverse impact on current practice unless the defendant argues a right to personally appear. Council member Schultz reported that the remainder of the chapter is essentially current law, clarified with some simplifications.

Council member Ott inquired as to whether any member was aware of studies regarding failure to appear in cases with or without secured bail. Council member Wagner stated that pursuant to the Justice 2000 initiative, Racine County had a pretrial release service that telephoned defendants to remind them of their court appearance. She reported that it significantly increased appearance rates. Council member Mangerson reported that he posts a notice in the newspaper when defendants miss a court appearance. The notice provides a time the following week at which they can basically appear by appointment. He reported a high voluntary appearance rate in response to the notice.

Council member Ptacek asked whether the proposal addresses return of bonds in cases where there is more than one file. In particular, he inquired as to whether the money could be applied to another file. He stated that this question often arises in cases where the funds were posted by third party. Council member Schultz stated that the draft does not change current law. He added that although this specific issue was not addressed in the proposal, the committee discussed it. Due to varying and highly specific fact patterns that can arise, the committee was unable to come to a resolution, so no change was recommended.

Council member Schultz explained that chapter 975, competency and insanity, breaks out some very long statutes into their own subchapters, with no significant substantive changes. The full Council previously worked on the proposed draft of ch. 975, and it was approved several years ago. The Council agreed that no further discussion was needed.

MOTION: Council member La Fleur moved, seconded by Council member Ptacek, to approve the draft provisions regarding consolidation, discovery, bail and bond, and competency and insanity. Motion approved unanimously, with Council members Roggensack and Ott abstaining.

Council member Schultz and Attorney Southwick will review the October 28th memo and the new provisions that were not discussed at today's meeting, will be covered next month.

V. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the Appellate Procedure Committee met on October 21st and began discussing the new projects that have been referred to the committee. The committee set the order in which it will prioritize the new projects, as follows: 1) protecting the identity of victims and witnesses; 2) promoting consistency and completeness of the record on appeal; 3) consolidating and clarifying the rules for prisoner challenges to state agency decisions; and 4) precedential value of overruled court of appeals decisions. With regard to the fourth project, the committee will be able to utilize a law student to conduct a comprehensive survey of state and federal law as a directed research project. The Council will enjoy the benefits, of an intern and the student will receive 3 credits for the work. The student will conduct the study during spring semester and provide progress reports to the committee.

With regard to protecting the identity of victims and witnesses, the committee identified a list of information to study, including: the court of appeals internal operating procedures, practices in neighboring states, circuit court local rules and practices, information from court operations regarding confidentiality provisions and sealing court records, model records policies used by CCAP, the types of cases that currently fall within the rules requiring confidentiality, rules and statutes authorizing the use of initials only or John/Jane Doe designations, and internal operating procedures or rules used in Wisconsin federal courts. Attorney Southwick has compiled most of the information, and the committee will begin discussing it at its meeting following the regular Council meeting. Committee Chair Stephens noted that as committee members have begun to review the requested material, it has become apparent that this issue is more complex than it initially appeared. It will likely require a more comprehensive study than was expected, so it may be several months before the committee has a draft recommendation for the Council to review.

The committee has received a draft bill from the Legislative Reference Bureau containing the proposed amendments to the presentence investigation statutes. It contains some notes and questions from the LRB drafter, so the committee will also begin reviewing the draft to respond to those issues.

B. Criminal Procedure

Chair Bertz extended his appreciation to Committee Chair Schultz for his work in leading the Council through the review of the bill to amend the criminal procedure rules. Committee Chair Schultz had no further report.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee met on October 21st and continued its work on the rules of evidence project. The committee has nearly completed its review of the rules that were included in the work plan adopted by the Council. The committee will consider additional issues or projects that it may bring to the Council for discussion and approval.

The committee will meet today after the regular Council meeting to consider a possible amendment to Wis. Stat. § 906.09, impeachment by prior conviction. Depending on the committee's final recommendation regarding s. 906.09, the committee may also finalize its draft recommendation for a note to accompany its proposed amendment to s. 906.08.

The committee will begin to study the hearsay exception for statements of recent perception, s. 908.045 (2). This provision is fairly unique to Wisconsin, and Professor Blinka has asked the Council to make a recommendation regarding whether the rule should be retained. Attorney Southwick added that this rule was included as part of the originally proposed federal rules, although it was not adopted. Wisconsin is one of about five states that adopted it, based on the federal draft.

The committee will also begin discussing *Alt v. Cline*, 224 Wis.2d 72, which basically created a privilege permitting experts to refuse to testify in certain circumstances. The committee will study whether the *Alt* rule should be codified.

Finally, the committee will consider whether further study is warranted with regard to a possible inconsistency involving s. 885.205, which creates a privilege for communications between students and school psychologists or deans. If the committee recommends further study, it will bring this project to the Council for approval.

VII. Other Business

A. PPAC Liaison's Report

Council member Wagner reported that PPAC is currently working on rules to address confidentiality of information obtain in specialty courts such as drug courts. PPAC is also drafting rules regarding limited scope representation.

B. Council Attorney's Report

Attorney Southwick reported that Council member Michael Christopher resigned. Although his Council term had expired, he continued to serve while awaiting the Governor's appointment of his replacement. Attorney Christopher has other volunteer commitments and finally had to resign so that he can devote his time to those other efforts. Three Council positions are filled by governor's appointments. In addition to the vacancy created by Attorney Christopher's resignation, the district attorney position on the Council has been vacant for quite some time. The third governor's appointment is currently held by Council member Foeckler, although his term has also expired. Attorney Southwick reported that both she and former Council Chair Hanan contacted the Governor's appointment secretary regarding the need to fill these three positions. The president of the Wisconsin District Attorneys' Association contacted the Governor's office with a recommendation for the vacant district attorney position.

Attorney Southwick reported that it has been two years since the supreme court adopted the rule change to permit the citation to unpublished opinions. The amendment was based on a rule change petition filed by the Judicial Council. At the time the court amended the rule, it appointed a committee to study implementation of the rule. Attorney Southwick served on the committee, which is currently preparing its two-year report. The draft report basically concludes that no major issues or problems have been reported or identified as result of the rule change. Attorney Southwick requested that members notify her if they have experienced any problems or have concerns with the new rule.

VIII. Adjournment

The Council adjourned at 11:25 a.m.