

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
December 17, 2010

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

MEMBERS PRESENT: Chair Beth E. Hanan, Vice Chair Professor David E. Schultz, Thomas W. Bertz, Michael R. Christopher, Allan M. Foeckler, Representative Gary Hebl, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, Senator Lena Taylor, A. John Voelker, Honorable Mary K. Wagner, Greg Weber, Nicholas C. Zales.

MEMBERS EXCUSED: Honorable Patricia S. Curley, Catherine A. La Fleur, Honorable Maxine A. White.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Adam Korbitz, State Bar of Wisconsin; Peg Carlson, Court of Appeals Chief Staff Attorney; Professor Meredith Ross, University of Wisconsin Law School; Jule Cavanaugh, Department of Corrections; Eric Peterson and Aaron Collins, Office of Senator Lena Taylor.

I. Call to Order and Roll Call

Chair Hanan called the meeting to order at 9:40 a.m. Council members introduced themselves.

II. Approval of November 19, 2010 Minutes

MOTION: Council member Hebl moved, seconded by Council member Bertz, to approve the November 19, 2010 minutes. Minutes were approved unanimously without amendment.

III. Discussion Regarding Recommendations from the Appellate Procedure Committee Regarding Presentence Investigation Reports

Council member Stephens welcomed Appellate Procedure Committee ad hoc members Jule Cavanaugh, Peg Carlson, and Meredith Ross.

Council member Stephens continued to lead a discussion following the format of her previously distributed memo regarding the presentence investigation (PSI) report proposal from the Appellate Procedure Committee. She focused the discussion on subsection B of section V of the memo, dated September 14, 2010, and previously distributed to all members. Subsection B addresses presence of counsel at the presentence investigation (PSI) interview, which is conducted by a representative from the Department of Corrections (DOC). Council member Stephens explained that the proposed amendment creates a statutory right to allow counsel to attend the PSI interview. Currently, case law does not recognize a constitutional right to have

counsel present at a PSI interview. Currently, requests by defense attorneys to attend PSI interviews are addressed by DOC on a case-by-case basis.

Council member Stephens stated that the committee was unable to reach consensus on this provision, which would require that defense counsel receive notice of the interview if the defense attorney has requested it, and be provided a reasonable opportunity (but not an absolute right) to attend the PSI interview. She summarized the viewpoints of the proponents of the provision, as well as the positions of the organizations opposed to it, and then opened the floor for questions and comments.

Council member Bertz asked whether the proposal provides defense counsel with a right to object to questions raised during the interview, and the authority to instruct the defendant not to answer. Council member Stephens responded that it is not the committee's intent to make the interview formal, including the addition of a right to object, although an attorney certainly would retain the right and duty to advise his or her client. She stated that in her personal experience, an attorney is more inclined to steer the defendant toward relevant information in responding to the question. She also stated that no court reporter is present during the interview. Jule Cavanaugh was present on behalf of DOC. Ms. Cavanaugh added that DOC is concerned with the attorney's undefined role at the interview. She raised questions, including the following: Is the attorney merely an observer? If the attorney objects to questioning, who will resolve it? Will the court need to rule on it? She also expressed concern that an attorney's instruction to a defendant not to respond to questions during the interview could hinder the interview process.

Council member Taylor reported that she recently had an opportunity to observe a federal sentencing proceeding. She stated that the objections to the PSI report were filed in written form, and the federal process seems to work well.

Council member Wagner indicated that in her experience, DOC has been accommodating when a defense attorney asks to attend the PSI interview or requests to reschedule the interview, although she believes it would be problematic to require the defense attorney to attend the interview.

Council member Leineweber spoke in favor of the goal of resolving miscommunications and objections to the PSI report prior to the sentencing hearing. If allowing the defense attorney to attend the PSI interview will result in reduced miscommunication and objections to the PSI report, he will support the proposal. He also asked Ms. Cavanaugh if DOC had any estimates regarding the cost involved in implementing the proposal. Ms. Cavanaugh stated that one of DOC's concerns centers on the definition of "reasonable opportunity" and the likelihood that attorney involvement in the interview could cause delays. For example, she stated that Dane County requires completion of PSI reports within 30 days. She compared the process to revocation hearings where the attorney has a right to attend and there are many instances of rescheduling. Revocation hearings generally take 30-50 days to schedule, while PSI interviews are usually scheduled within 7-14 days. Dane, Rock and Green Counties had 727 revocation hearings between January 1, 2010 and June 30, 2010. Of those, 159 were rescheduled by the attorney, resulting in 5179 days in hearing delays. Ms. Cavanaugh also inquired as to protocol if

the attorney fails to request notice of the interview, but the defendant demands that the attorney attend. Does the interviewer stop to process and reschedule?

Ms. Cavanaugh also stated that in Dane County from October 8, 2009 to August 31, 2010 there were 215 PSI's ordered by the court. The average interview takes about three hours. If defense attorneys attend the interviews, it will add at least 640 hours of attorney time annually in Dane County, so there is an expense associated with attorney attendance at the interviews.

Council member Stephens pointed out that one distinction between revocation proceedings and PSI interviews is that defendants have a right to counsel at a revocation hearing, so an attorney's request to postpone a hearing must be accommodated. The current proposal does not create a right to counsel at a PSI interview. The proposal only grants a right to notice and a reasonable opportunity for counsel to attend the interview. If the interviewer has 30 days to complete the PSI report, reasonable opportunity to attend would constitute notice and scheduling of the interview within those 30 days to allow timely completion of the report. Additionally, she pointed out that currently defendants have no duty to answer any questions during the PSI interview, and the result of defendant's failure to answer is an incomplete report. If defense counsel instructs a defendant not to answer a question during the interview, the result is still an incomplete report. With or without counsel present, defendants must choose between providing information that may be damaging to them or refusing to answer and appearing uncooperative to the interviewer and the court.

Council member Schultz recognized that case law does not find a constitutional right to representation at a PSI interview, but he pointed out that in any other context, an attorney would not send a client to an important interview with the opposition without providing counsel. He referenced *State v. Hess*, 2009 WI App 105, ¶ 31, in which the court stated, "And, should the defendant fail to cooperate [at the PSI interview], he or she does so at great risk. A sentencing court could well find that the behavior shows contempt for the judicial process and is therefore indicative of bad character." The *Hess* case demonstrates the need to have an attorney present to advise the defendant of the importance, as well as the risks associated with the PSI interview.

Council member Roggensack questioned whether the proposed Wis. Stat. § 972.15 (1c) would change a substantive right of the defendant. Council member Ptacek added a further inquiry: Is it the attorney's right or the defendant's right? Appellate Procedure Committee Member Meredith Ross responded and stated that the federal cases refusing to find a right to counsel at the PSI interview (these are the cases that formed the basis for the Wisconsin cases reaching similar holdings) basically became moot after 1994 when Congress amended Rule 32 of the Federal Rules of Criminal Procedure. The 1994 amendment to Rule 32 contains a provision that is virtually identical to proposed Wis. Stat. § 972.15 (1c). Following the 1994 federal amendment, the issue surrounding presence of counsel at the PSI interview basically went away at the federal level. Prior to the amendment, some probation officers allowed attorneys to attend the interviews, but not others, which was perceived to undermine the fairness of the judicial system. Committee member Ross expressed concern that the fairness of Wisconsin's system could also be compromised because although probation officers are generally accommodating and allow attorneys to attend interviews, there is nothing that requires them to do so. This could lead to disparity. Additionally, the consequences of statements made at PSI interviews have

increased dramatically in recent years. For example, statements made during PSI interviews can become the basis for chapter 980 lifetime commitments or requiring sex offender registration. PSI reports can also be used to determine early release candidates. The U.S. Supreme Court has recently found that collateral consequences can implicate the right to counsel and the right to effective counsel, so shouldn't lawyers have an opportunity to attend proceedings that could result in collateral consequences for their clients? Committee member Ross added that she does not believe attorneys will ask to attend or need to attend every interview, but as at least one state supreme court has noted (*State ex rel. Russell v. Jones*, 293 Or. 312, 647 P.2d 904, 907 (1982)), the presence of counsel tends to make the defendant more cooperative at the interview.

Chair Hanan suggested that although the proposal may lengthen the amount of time needed to prepare PSI reports in some cases, it could also save judicial resources expended in the future because extra time was spent on the initial report preparation. With regard to the questions of whether it is a substantive right or the identification of who holds the right, Chair Hanan reminded members that the proposal only provides a right to notice to the attorney, not an absolute right to counsel. Attorneys have a duty to keep their clients informed, so while the notice goes to the attorney, the client would also be notified and involved in making the decision whether or not the attorney should attend the interview.

Council member Roggensack inquired as to whether an attorney's decision not to attend a PSI interview could result in a claim of ineffective assistance of counsel if the defendant later feels that the PSI report led to a different sentence than he or she would have liked. Chair Hanan asked whether other jurisdictions have seen an increase in ineffective assistance of counsel related to the notice requirement. Council member Stephens stated that an assistant U.S. attorney spoke to the committee regarding the federal process (the model on which the proposal is based), and she did not state whether the federal amendment to provide notice and allow presence of counsel at PSI interviews has resulted in ineffective assistance of counsel claims. The committee was unable to obtain information regarding the impact on ineffective assistance of counsel claims in other jurisdictions. Council member Weber stated that regardless of whether a defendant prevails on an ineffective assistance of counsel claim regarding presence of counsel at a PSI interview, the claim will still use judicial resources and require a defense, taking valuable time away from other issues and cases. Council member Stephens added that it is very difficult to speculate on the impact the proposal may have on ineffective assistance of counsel claims because neither lawyers nor courts track the specific issues that give rise to such claims. Council member Roggensack added that some judges track them, but the information is maintained for their personal use and is not disseminated.

Council member Shriner suggested that the proposal may be a solution in search of a problem since nothing currently prohibits attorneys from attending PSI interviews, and no evidence has been presented to suggest that attendance at a PSI interview has been denied to any attorney. He also inquired as to the remedy if notice is not given to the attorney.

Council member Wagner stated that when defendants fail to attend the PSI interview, that fact is included in the PSI report. Defendants often have a difficult time keeping track of appointments, and she suggested that perhaps notice to counsel would increase defendants'

attendance. Notice and presence of counsel may also result in better preparation for the interview, and more complete and accurate responses to the interviewer's questions.

Council member Leineweber pointed out that no one has suggested that the amendment would diminish or detract from the quality of PSI reports, and several good arguments have been made that it would likely improve the quality and accuracy of the reports so he is in favor of the amendment.

Council member Bertz inquired as to the process for making the proposed amendment. Council member Stephens explained that the amendment will require legislation, and the Legislative Fiscal Bureau may prepare a fiscal note as part of the legislative process.

MOTION: Council member Christopher moved, seconded by Council member Schultz, to approve the proposed amendment to s. 972.15 (1c), and the accompanying working note. Chair Hanan called for a recorded vote by a show of hands. Council members Hanan, Schultz, Bertz, Christopher, Foeckler, Leineweber, Miller, Stephens, Taylor, Voelker, Wagner, Zales voted in favor of the motion. Council members Ptacek, Shriner, and Weber opposed the motion. Council member Roggensack abstained. Council member Hebl was absent.

Attorney Southwick distributed copies of a letter recently received from the Wisconsin District Attorneys Association (WDAA) containing comments regarding the PSI proposal. The letter is an updated version of the comments that WDAA previously submitted, reflecting the additional amendments that have been made to the PSI proposal. WDAA did not raise any new or additional objections.

IV. Discussion and/or Action Regarding Meeting Locations

Council members resumed their discussion regarding holding one or more regular meetings at a location outside the State Capitol. Previously, the Council generally agreed to explore the idea of holding the February or March meeting in Milwaukee, possibly at Marquette University Law School (MULS), University of Wisconsin—Milwaukee (UW-M), Alverno College or Milwaukee Area Technical College (MATC).

Attorney Southwick reported that both MULS and UW-M offered to host a meeting at no cost to the Council. She provided cost estimates for the other locations, as well as a summary regarding parking and technical resources available at each location. Council member Christopher asked Attorney Southwick for her recommendation. Attorney Southwick recommended holding a meeting at MULS and UW-M since both schools were very gracious in their willingness to host the Council. She suggested that perhaps the Council could meet at one location on March 18th, and then plan a meeting at the other location in the fall. Council member Zales reported that he recently attended an event at MULS and the experience was excellent. He said the facilities were wonderful, and parking was very convenient.

MOTION: Council member Taylor moved, seconded by Council member Wagner, to hold the Council's regular March 18, 2011 meeting at Marquette University Law School and to work

with University of Wisconsin—Milwaukee to host another Council meeting in Milwaukee in the spring or fall of 2011. The motion was approved unanimously. Council members Hebl, Foeckler and Stephens were absent.

V. Discussion and/or Action Regarding Wisconsin Rules of Evidence
A. Wis. Stats. §§ 907.03 and 907.05, Bases of Expert Opinion

Council member Leineweber reported that the Evidence & Civil Procedure Committee studied Wis. Stats. §§ 907.03 and 907.05, bases of expert opinion, and prepared a recommendation to the Council. The recommendation was provided to all council members in a memo distributed prior to the meeting. However, he asked council members to delay action on the recommendation because Council member Christopher provided him with some written concerns, which he felt should be addressed by the Evidence & Civil Procedure Committee prior to Council action.

Council member Leineweber explained that failure to disclose to the jury the bases of the expert's opinion tends to undercut the expert's opinion, and the jury may not give proper weight to it. However, if the jury hears the otherwise inadmissible information on which the expert based the opinion, the door has been opened for hearsay. The challenge is to find the middle ground, which the committee's recommendation attempts to find. He asked the Council to focus on the extent to which the court should be tasked with screening information regarding the otherwise inadmissible bases of the expert's opinion. Members of the committee generally felt that the federal rule encourages too much screening by the court.

Attorney Southwick reported that in 2005, the legislature passed a bill adopting the same amendment that was made to the federal rule; however, it was vetoed by the governor. It is likely that the bill will be reintroduced in the upcoming session.

Vice Chair Schultz noted that the committee recommendation suggests the use of a limiting instruction. He asked whether the committee gave any thought to the content of the limiting instruction. Council member Leineweber stated that limiting instructions are already used, but clarified that the committee does not believe a limiting instruction is the only, or even the best solution. Council member Leineweber also stated that a more common approach is to have an expert explain the bases of an opinion without relaying out-of-court statements to the jury.

Chair Hanan stated that the Evidence & Civil Procedure Committee will continue to discuss a recommendation at its noon meeting, following the regular Council meeting. If any members have specific concerns or comments, please relay them to a committee member prior to the meeting.

VI. Committee Reports

A. Appellate Procedure

Chair Hanan reported that she and Attorney Southwick attended the December 9th meeting of the PPAC subcommittee tasked with making recommendations to PPAC regarding the limited scope representation. The PPAC subcommittee asked the Appellate Procedure Committee to study and offer recommendations specific to appellate practice regarding ghostwriting of legal documents.

B. Criminal Procedure

Vice Chair Schultz reported that there were no changes since last month.

C. Evidence and Civil Procedure

Council member Leineweber reported that the committee is working on two additional issues related to the new electronic discovery rules, including Rule 502/clawback and duty to preserve/spoliation. The committee will also continue its review of the rules of evidence. Committee members will begin their review of Wis. Stats. §§ 906.09, impeachment by prior conviction at today's meeting. Council member Roggensack suggested that the committee consult with Judge Crocker regarding the Western District Court's experiences with electronic discovery.

VII. Other Business

A. Supreme Court Advisory Committee on Rules Petitions Procedure Report

There was no committee report.

B. PPAC Liaison's Report

There was no committee report.

C. Assembly Judiciary Committee Report

There was no committee report.

D. Senate Judiciary Committee Report

Council member Taylor provided a written report regarding potential recommendations from the Legislative Council's Criminal Justice Funding & Strategies Committee. She asked Council members to provide any comments to her prior to the committee's final meeting on January 12, 2011. Following its final meeting, the committee will provide a report to the Legislative Council.

Council member Taylor reported that Senator Zipperer will be the new chair of the Senate judiciary committee, so he will be replacing her on the Judicial Council effective January 2011. Chair Hanan thanked Senator Taylor and Representative Hebl for their work on the Judicial Council.

E. Council Attorney's Report

Attorney Southwick reported that she is working with the State Bar to coordinate another continuing legal education webcast on the new e-discovery rules, and it has been scheduled for March 31, 2011.

VIII. Adjournment

The Council's next meeting is scheduled on January 21, 2011.

The Council adjourned by consensus at 11:30 a.m.

DRAFT