

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
January 21, 2011

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, Honorable Edward E. Leineweber, Stephen Miller, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Honorable Mary K. Wagner, Greg Weber, Honorable Maxine A. White, Nicholas C. Zales.

MEMBERS EXCUSED: Honorable Patricia S. Curley, Allan M. Foeckler, Catherine A. La Fleur, Representative Jim Ott, Marla J. Stephens, A. John Voelker, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Margaret Porco, State Bar of Wisconsin; Peg Carlson, Court of Appeals Chief Staff Attorney; Professor Meredith Ross, University of Wisconsin Law School; Lucas Vebber, Office of Senator Zipperer; Nancy Rottier, Office of Director of State Courts.

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

Chair Hanan called the meeting to order at 9:40 a.m.

**II. Approval of December 17, 2010 Minutes**

MOTION: Council member Roggensack moved, seconded by Council member Shriner, to approve the December 17, 2010 minutes. Minutes were approved unanimously without amendment.

**III. Discussion and/or Action Regarding Special Session Senate/Assembly Bill 1, Tort Reform**

Attorney Southwick introduced an information item regarding Special Session Senate and Assembly Bill 1, which has been approved by both the Senate and the Assembly. She called the Council's attention to sections 33-38 of the bill. These provisions impact the rules regarding lay and expert witness testimony. She reminded members that the Evidence and Civil Procedure Committee is currently studying Wis. Stat. §§ 907.03 and 907.05 of the Wisconsin Rules of Evidence addressing inadmissible bases of expert opinion testimony. Section 907.03 will be substantially amended by the passage of AB/SB 1. The amendment contained in the bill mirrors an amendment made several years ago to its federal counterpart, Rule 703 of the Federal Rules of Evidence.

Council member Weber asked whether the bill establishes an effective date. Attorney Southwick reported that Senate Amendment 9 states that the bill takes effect the day after publication.

Council member Leineweber stated that the Evidence & Civil Procedure Committee will meet at noon. Committee members will discuss AB/SB 1, and its impact on the committee's study of ss. 907.03 and 907.05.

Attorney Southwick asked council members to advise the committee if there are any specific issues that they would like the committee to review or address with regard to ss. 907.03 and 907.05, in light of the anticipated passage of AB/SB 1.

#### **IV. Discussion Regarding Recommendations from the Appellate Procedure Committee Regarding Presentence Investigation Reports**

Appellate Procedure Committee member Meredith Ross led a discussion on subsection C of section V of the memo from Committee Chair Marla Stephens, dated September 14, 2010 (previously distributed to all members). Subsection C addresses presentence investigation (PSI) report content. Committee member Ross stated that these proposed amendments generally add provisions requiring more detailed PSI report content. Many of the additions were taken from current provisions in the Wisconsin Administrative Code, and some changes reflect recent amendments to sentencing laws.

Committee member Ross summarized the changes recommended to Wis. Stat. § 972.15 (1a), (2a) and (2d). Council member Shriner inquired about the source of the language used in s. 972.15 (2a) (d), Factual basis for finding of guilt. Committee member Ross explained that the language was borrowed from the Department of Correction's (DOC) Probation and Parole Operations Manual. She explained that the expectation is that the attorneys will be responsible for ensuring that the PSI report writer accurately states the factual basis for the finding of guilt, and does not simply copy information from the complaint. Several council members questioned the use of the following language: "journalistic, non-legal description." Committee member Ross read the entire provision from the DOC Operations Manual from which the language was borrowed, and also clarified that the report will still contain the victim's statement.

Council member Shriner suggested that the PSI recommendations may go too far by attempting to resolve all post-sentencing issues that may arise. Committee member Ross explained that because the content of the report can have significant post-sentencing impact on the defendant, such as by forming the basis for a lifetime commitment under Chapter 980, she believes the court has some responsibility to consider the post-sentencing issues that could arise. Council member Weber stated that he has seen PSI reports that contain little more than the facts copied directly from the criminal complaint, even though a lot of new information may have been obtained as the case developed. Council members discussed various options in cases when the defendant and the victim disagree as to the facts. It was generally agreed that ultimately, the judge will need to make a factual determination in those cases.

Council member Ptacek suggested that the court record may be the best source for the factual basis for the finding of guilt. Committee member Ross stated that when the transcript from a court proceeding is transmitted with the PSI report, the transcript often gets separated from the PSI report so it may not be utilized by DOC for programming purposes. Therefore, she

emphasized the importance of including the factual basis for the finding of guilt in the body of the PSI report.

Council member White urged that the PSI report should not replace the actual plea hearing transcript as the source of the factual basis for the plea. She stated that in her experience, report writers' recount of the plea, the facts that formed the basis for the plea, the read-ins and the dismissed charges in the PSI report are not always accurate, so judges generally must go back and review the plea hearing transcript prior to sentencing. Committee member Ross explained that the report writer does not generally attend the plea hearing, so the proposal places the burden on the attorneys to ensure that this section accurately reflects what occurred at the hearing. She agreed that sometimes it may involve obtaining the plea hearing transcript, especially in complex cases. The goal of the proposed amendment is to make sure that the facts that are included in the PSI report accurately reflect what occurred at the plea hearing.

Chair Hanan suggested the deletion of the phrase "journalistic, non-legal" to resolve some of the concerns expressed with s. 972.15 (2a) (d). Committee member Ross suggested that requiring written plea agreements would also resolve some of the issues. Members suggested that the PSI report writer should simply review the transcript of the plea hearing to obtain the information. Council member Wagner explained that due to the court reporters' very busy schedules, transcripts are often not available for up to 60 days after a hearing, while PSI reports are often expected to be completed within 30 days. Additionally, she questioned who will pay for the preparation of the transcripts. Council member White suggested that the attorneys should also be responsible for drafting an amended complaint to more accurately reflect the facts.

Council member Christopher stated that he supports the committee's goal of requiring more detailed content in the PSI report. He suggested that the cost of the sentencing alternatives should also be included in the content of the report, similar to the model used in Missouri. Council member Weber noted that another alternative that has been proposed would require DOC to provide judges with statistical information such as alternative program cost information, waiting time for treatment programs, and current prison population. Council member Weber explained that the court currently considers the seriousness of the offense, character of the offender, and the need for public protection in determining sentencing. He questioned how cost would factor into the current analysis, but offered that it may bear consideration in connection with public interest, as opposed to public protection. Council member Shriner opposed adding a provision to the PSI report addressing sentencing costs because he felt that the factors for the judge's consideration regarding sentencing are best left to the determination of the legislature. Chair Hanan suggested that the Appellate Procedure Committee study the Missouri model regarding cost of sentencing, and report back to the full Council prior to further debate on this issue.

Council member Leineweber noted with approval that the amendments require that the PSI report contain information regarding sentence credit. He noted that this is often a very contentious issue. Committee member Ross explained that the DOC report writer is in the best position to obtain the information, and hopefully this provision will reduce the confusion and result in fewer appeals regarding sentence credit.

With regard to s. 972.15 (2d), Committee member Ross explained that the proposal simply adds a new early release provision to conform with amendments to current law.

MOTION: Council member Bertz moved, seconded by Council member Christopher, to approve proposed s. 972.15 (1a).

Vice Chair Schultz noted that this section is entitled: “Neutral report.” However, the text of the section does not include the term “neutral.”

Council members Bertz and Christopher accepted a friendly amendment from Council member Leineweber to approve s. 972.15 (1a), subject to an amendment to strike the term “non-argumentative” and replace it with the term “neutral.” Motion approved unanimously. Council member Roggensack abstained.

MOTION: Council member Shriner moved, seconded by Council member Bertz, to approve proposed s. 972.15 (2a) (a), (b) and (c), and refer (d) back to the Appellate Procedure Committee for further development in light of the Council’s discussion.

Council member Leineweber asked whether the committee reached a consensus on sub. (d). Committee member Ross responded in the affirmative. Council member Leineweber suggested approval of (d). He noted that the Council was unable to reach a consensus during its discussion regarding this subsection, so he suggested that they defer to the committee’s recommendation. Attorney Southwick added that the committee spent a considerable amount of time drafting this subsection. It was modified substantially in response to concerns expressed by stakeholders such as DOC, and in recognition of the fact that report writers do not generally attend plea hearings.

Council member White stated that the provision should direct the PSI report writer to the court record from the plea hearing as the best source of information for this subsection. Attorney Southwick noted that the original language proposed by the committee directed the report writer to “incorporate only those allegations in the circuit court record that formed the factual basis for the acceptance of a plea.” Council member White further objected to the working note accompanying this subsection because it does not reference the judge’s determinations and the court record. Committee member Carlson clarified that the working notes included with the proposal are only meant to convey the committee’s reasoning and thought process to the Council to aid in its review of the proposal. The working notes are not intended for publication.

Council member Shriner declined to amend his original motion. He agreed that the report writer should be required to rely on the court’s findings made at the plea hearing, and suggested that the language originally drafted by the committee may be a better alternative than the language contained in proposed sub. (d). Motion to approve proposed s. 972.15 (2a) (a), (b) and (c), and refer sub. (d) back to the committee approved unanimously. Council member Roggensack abstained.

## **V. Committee Reports**

**A. Appellate Procedure**

Chair Hanan reported that the Appellate Procedure Committee has identified a number of issues regarding ghostwriting at the appellate level. At the last meeting on January 10, the committee began discussing how to address those issues. The committee may begin meeting twice a month to meet the deadlines of the PPAC subcommittee that is studying limited scope representation.

**B. Criminal Procedure**

There was no report.

**C. Evidence and Civil Procedure**

Council member Leineweber reported that the Evidence & Civil Procedure Committee has been working on Wis. Stats. §§ 907.03 and 907.05, bases of expert opinion, but the scope of its study may change in light of the passage of AB/SB 1. At its meeting later today, the committee will continue to discuss Wis. Stat. §§ 907.03 and 907.05, and make a recommendation to the Council. The committee also continues to study Rule 502 of the Federal Rules of Evidence (inadvertent disclosure of privileged information), and intends to make a recommendation regarding a comparable state rule as a follow up to its proposal regarding the recently adopted e-discovery rules. The committee also continues to study Wis. Stat. §§ 906.08 and 906.09.

**VI. 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. Council Attorney's Report**

1. Open Meetings Law

Attorney Southwick postponed her report on open meetings law due to limited time remaining for the meeting and the absence of a number of members.

2. Budget

The Council is currently slightly under budget in its spending. At the mid-point of the fiscal year, the Council had expended approximately 48% of its budget.

3. Meeting in Milwaukee

Marquette University is currently in the process of assigning a room for the Judicial Council's March 18<sup>th</sup> meeting at the law school. The Council will meet at its usual time of 9:30 a.m. She stated that the Council will likely still be discussing the PSI proposal, and hopefully there will also be a rule of evidence to discuss at the meeting. Council member Leineweber suggested that perhaps a Rule 502-type proposal regarding inadvertent disclosure of privileged information may be ready for Council discussion at the March 18<sup>th</sup> meeting. Attorney Southwick asked Council members to notify her of any groups that may be interested in attending the meeting so that she can extend an invitation.

## **VII. Adjournalment**

Chair Hanan announced that the next Council meeting will be on February 18<sup>th</sup>, and the Appellate Procedure Committee and the Evidence & Civil Procedure Committee will both meet today at noon.

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