MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MILWAUKEE, WISCONSIN
March 18, 2011

The Judicial Council met at 9:30 a.m. in Room 433AB, Eckstein Hall, Marquette University Law School, 1215 W. Michigan Street, Milwaukee, Wisconsin

MEMBERS PRESENT: Chair Beth E. Hanan, Thomas W. Bertz, Allan M. Foeckler, Catherine A. La Fleur, Honorable Edward E. Leineweber, Stephen Miller, Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Patience Roggensack, Thomas L. Shriner, Marla J. Stephens, Honorable Mary K. Wagner, Honorable Maxine A. White, Nicholas C. Zales.

MEMBERS EXCUSED: Vice Chair Professor David E. Schultz, Michael R. Christopher, Honorable Patricia S. Curley, Rebecca St. John, A. John Voelker, Senator Rich Zipperer.

OTHERS PRESENT: Dean Joseph Kearney, Marquette University Law School; Peg Carlson, Court of Appeals Chief Staff Attorney; Professor Meredith Ross, University of Wisconsin Law School; Denise Symdon, Department of Corrections; Hon. Richard Sankovitz, Milwaukee County Circuit Court.

## I. Call to Order and Roll Call

Dean Kearney provided opening remarks to welcome the Judicial Council to Marquette University Law School. Chair Hanan called the meeting to order at 9:35 a.m.

## II. Approval of February 18, 2011 Minutes

The February 18, 2010 minutes were approved by consensus without amendment.

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

Appellate Procedure Committee Chair Marla Stephens led a continued discussion of the proposed amendments to Wis. Stat. § 972.15. Council member Stephens noted that one proposed change regarding presentence investigation (PSI) report content was inadvertently omitted from discussion and approval at the previous meeting. The proposed new s. 972.15 (2d) requires a statement regarding eligibility for a risk reduction sentence to reflect a new sentencing option for the courts that was added in 2009. Council member Ptacek noted that on occasion the individual conducting the defendant's assessment and evaluation will reach a different conclusion regarding sentencing option or program eligibility than the one provided by the PSI report writer. Denise Symdon stated that she was unaware of that issue and would obtain additional information.

MOTION: Council member Stephens moved, seconded by Council member Shriner, to approve the proposed amendment to Wis. Stat. § 972.15 (2d). Motion approved unanimously, with Council member Roggensack abstaining.

Council member Stephens explained that the core of the committee's proposal is the remaining recommended changes to procedures surrounding the review process and use of PSI reports at the time of sentencing. She began the discussion with proposed s. 972.15 (2) (a)-(h), disclosure of and objections to presentence investigation materials. Current law requires that the judge disclose the contents of the report to the defendant's attorney, or to the defendant if he or she is unrepresented, and to the district attorney prior to sentencing. Current law also allows the district attorney and the defendant's attorney to obtain and retain a copy of the PSI report. It also allows an unrepresented defendant to view, but not keep a copy of the report. Current law does not provide guidance regarding when the PSI report should be disclosed or what should be done in the event that it is inaccurate.

Council member Stephens explained that the proposed amendments require the PSI writer to provide a draft of the report to both sides, and make a copy available to the defendant to review personally. The parties must then provide the PSI writer with written objections to any material information in the report. The PSI writer may amend the PSI report prior to submitting it to the court, or may submit the report to the court along with any unresolved objections. At the sentencing hearing, but prior to sentencing, the court is required to make a finding that any controverted information is accurate or order the controverted information stricken from the PSI report. Thereafter, the PSI writer must create a final, corrected PSI report reflecting the factual determinations of the court, and destroy prior inaccurate drafts. Council member Shriner inquired as to whether this process will require an additional hearing. Council member Stephens said that an additional hearing is not required, but the finding by the judge should be made prior to sentencing. The PSI writer can correct the report after sentencing. Council member Bertz asked whether testimony will be given. Council member Stephens said the decision to hear testimony will be left to the judge's discretion, consistent with current case law. (*See State v. Anderson*, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998)).

Council member White asked about the current process to allow an unrepresented defendant to review the report. Council member Stephens stated that there is currently no process set forth in the statute to address it beyond a provision that states that an unrepresented defendant is entitled to view the PSI report. She added that although the proposal provides guidance such as when the unrepresented must be allowed to view the report, the proposal leaves it up to the individual jurisdictions to determine how best to effectuate it. The notes provide some suggestions regarding ways in which it could be accomplished.

Council member Stephens noted that proponents of this change, including the University of Wisconsin Law School's Remington Center and the State Public Defender's Office (SPD), believe that given the presentence investigation report's importance at sentencing and thereafter — in correctional decision-making, reconfinement, sentencing proceedings or ch. 980 commitment proceedings — and given the defendant's constitutional right to be sentenced on the basis of accurate information, the PSI report should be reviewed both by the defendant personally and with defense counsel for errors or omissions, and all disputes about its contents should be resolved prior to sentencing.

The Department of Justice (DOJ), Wisconsin District Attorneys' Association (WDAA) and the Department of Corrections (DOC) do not dispute that defense counsel and/or the defendant should be permitted to review PSI reports prior to sentencing, and support the goal of report accuracy. DOJ and DOC do not object to the creation of a final, corrected PSI report after sentencing for purposes of DOC programming. They question the efficacy of having PSI writers attempt to resolve factual disputes before sentencing. They believe that, if defense counsel fulfills his or her role, the current system (in which defendants have a right to rebut factual representations at sentencing and to be sentenced based on accurate information) is sufficient to ensure that PSI reports are accurate.

Council member Stephens went on to explain that the proposal adds a structured time line that is not currently found in Wis. Stat. § 972.15. The proposal requires that 21 days prior to sentencing, the PSI report writer shall provide a draft of the report to the defendant's counsel, if any, and to the district attorney, and shall make an additional copy available to the defendant to review personally. The defendant then has ten days to communicate objections to the report writer. The report writer then has seven days to either file an amended PSI report with the court, or notify the court of the unresolved objections. She added that the committee does not envision the report writer conducting a lot of additional investigation. Sometimes, based on anecdotal experience, report writers simply decide to strike disputed information if it is inconsequential. However, if the allegedly inaccurate information is material, Council member Stephens stated that the judge should be notified of the dispute.

Those opposed to the proposed timelines feel it is impractical under current PSI report writer workloads. They also expressed concern that the proposed procedures will delay sentencing hearings, which will result in defendants spending increased time in county jails at county expense. DOJ and DOC do not dispute that defense counsel should receive PSI reports with sufficient time to go over them with defendants prior to sentencing. But DOJ and DOC believe that additional obligations should not be imposed on DOC to ensure that defense counsel fulfill their obligation to timely review PSI reports for inaccuracies and to go over PSI reports with defendants.

Proponents of the proposed procedures argue that the amendments are intended to maximize judicial economy by providing for resolution of PSI report inaccuracies prior to the sentencing hearing. They believe this will result in more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon the presentence investigation report, and in the discretion of the court, to introduce evidence concerning their objections to the report. Proponents believe that the proposal's primary burden falls on defense counsel, rather than the report writer—who will be drafting no more reports than prior to the amendment of the statute, and who should have been amending PSI reports to reflect corrections made in court all along. The goal of the statute is to create a timeline that requires defense counsel to review the PSI report with the defendant before sentencing, so that any errors can be addressed prior to the sentencing hearing. Finally, they note that the proposed process is modeled on the federal system (although with a shorter time line), and that federal actors—prosecutors and defense counsel—appeared before the committee and reported that the process works smoothly and effectively to delete inaccuracies and resolve disputed assertions in federal PSI reports.

Council member Stephens clarified that under the proposal, objections can be filed regarding material information contained in or omitted from the report. After receiving the objections, the report writer has the option of revising the report, or filing the original version of the report with the court, accompanied by an addendum noting defendant's objections. For good cause shown, the court can allow new objections to the report to be raised at any time before imposing sentence. At the sentencing hearing, the court shall allow comments on the PSI report and shall rule on any unresolved objections prior to sentencing. At its discretion, the court may allow testimony to help resolve objections. For each objection to the report, the court must find that the controverted matter is accurate, or must order it stricken from the report. The amendments also make it clear that at the conclusion of the sentencing hearing, the defendant must return all copies of the PSI material to the court clerk. If the court orders any corrections to the report, an amended report must be filed and a note must be added to the cover sheet indicating that it's the final report. The final report is the only one that may be used for DOC programming, chapter 980 commitments, subsequent court hearings, etc. For good cause shown, the time limits may be enlarged.

Council member Stephens explained that the working note following proposed s. 972.15(2) constitutes the committee's rational to the Council to explain the reason for the recommended amendment.

Council member Leineweber inquired as to the overall time frame envisioned by the committee from the date the PSI report is ordered until the sentencing hearing. He also noted that the proposal only appears to give the court the option of finding disputed information to be accurate or striking it from the report. He asked whether the court could substitute findings for controverted information in the PSI report. Council member Stephens agreed that the options given the court in the event of an inaccuracy in the report may be incomplete. She agreed that there could be situations when it would be appropriate for the court to order the information in the report to be amended. She suggested that sub. (2)(e) should be modified to provide the court with an option to amend an inaccurate report. With regard to the overall time frame, Council member Stephens explained that information was not available regarding the average current time between ordering a PSI report and the sentencing hearing.

Council member Ptacek stated that in Racine County, the court negotiated with DOC regarding the amount of time to prepare a PSI report. He explained that they agreed to a shorter period of time to prepare a report for a defendant who is in custody, in exchange for a longer period of time to prepare a report for a defendant who is not in custody. He said they generally allow 4 weeks for the preparation of a report for a defendant who is in custody. He expressed concern that if the report writer has to provide a draft of the report three weeks in advance of the sentencing hearing, it may add three weeks to the overall time. He said that PSI report writers are generally not present at the sentencing hearing, but many minor errors such as an incorrect birth date or misspelled name can often be dealt with on the record without objection. He noted that more serious errors, such as a recommendation based on an incorrect penalty, typically result in an adjournment to give the agent time to correct the error and file an amended report. He suggested that there are ways to handle inaccuracies without establishing rigid timelines. He also suggested judicial education courses to specifically address how the court should address

errors in the report. He added his support for sub. (2)(e), and clear statutory language regarding the responsibility of the judge in the event of an error, along with clear language indicating that the judge is responsible for resolving it. He also supported proposed sub. (2)(g) to ensure that there is an accurate court record. However, he was opposed to the 21 day timeline in (2)(a)-(c).

Council member Roggensack expressed concern for time limits that can only be extended for good cause because it could create an issue to be challenged on appeal.

Appellate Procedure Committee member Meredith Ross stated that in her experience handling both state and federal appeals, written objections are very useful because they make a record to clarify the defendant's exact objections to the report. She added that defense attorneys who provided information to the study committee indicated that they have failed to object to inaccuracies in the report at the sentencing hearing because they did not want to slow things down at the hearing and risk irritating the judge. She also added that while the 21 day timeline may add a little time to the process, it's unclear how much time it would actually add because currently DOC report writers provide the report to the defendant or defendant's attorney prior to the sentencing hearing, although it may only be 7 to 10 days prior to the hearing.

Council member Wagner supported the requirement that the defendant file written objections to the PSI report, but opposed the 21 day timeline. Council member White expressed concern that additional delay in the process will contribute to the already over-crowded jails in some counties. She suggested that jail conditions will encourage many defendants to waive the 21 day timeline, which will eliminate the proposed benefits of this amendment. She also expressed concern that some facts are not material to sentencing, but are material for purposes of DOC programming. Judge Sankovitz added that PSI reports are already ordered in fewer cases in Milwaukee County. He suggested that if the process becomes more cumbersome, it will lead to the court ordering even fewer reports.

Council member La Fleur stated that sub. (2)(c)(i) appears to put the burden on the report writer to do the defense attorney's job. She suggested that it should be the responsibility of the defense attorney to present the objections and the grounds for the objections to the court. Council member Stephens explained that the defendant does have a duty to prepare written objections, but the proposal intentionally requires that the objections must be provided to the report writer, not the court. The report writer has a duty to convey them to the court only if they are unresolved because it is likely that the report writer will agree with some of defendant's objections. If the defendant had to provide objections directly to the court, even though the report writer corrected some of the disputed information prior to filing the report with the court, then the court would receive inaccurate information. One of the goals of the proposal is to prevent the court from receiving inaccurate information.

Council member Shriner suggested that perhaps the federal system is not a good model because the federal system has more resources available. He also stated that it does not sound like inaccuracies occur frequently enough to justify the additional expense and delay. He added that it does not sound like mistakes are usually serious in nature, and suggested that they can be resolved by the judge when they do happen. Committee member Ross disagreed that inaccuracies do not happen frequently or that they are not serious. She stated that PSI reports are

only prepared for defendants who are going to prison for serious crimes and she believes it is appropriate to develop a process to insure a high degree of accuracy. Because PSI reports are used not only for sentencing, but also for correctional programming, inaccurate information in a PSI report can adversely affect a defendant for many years. She also added that information from a report is often used to draft subsequent reports if the defendant is convicted of another crime. As a result, once a mistake is made, it can haunt a defendant for a lifetime.

Council member Stephens stated that in her experience managing the appellate division of the State Public Defender's office, many defendants complain on appeal that they did not have a chance to review the PSI report prior to sentencing, or that trial counsel told them not to worry about errors in the report. She agreed that imposing time limits may not be the solution, and suggested that adjournments may be a better option for handing errors in the report. However, she stated that regardless of the approach, action needs to be taken to improve report accuracy because errors raise constitutional concerns, and put additional stress on the already over-burdened justice system. She suggested that at a minimum, an amendment should require earlier disclosure to counsel because there is currently nothing in the statute that affords defense counsel any time to review the report in advance of sentencing. Defense counsel must receive the report a sufficient amount of time in advance of sentencing to allow the defendant to have a meaningful opportunity to review it and discuss it with his or her attorney. This is necessary to allow defense counsel to fulfill their professional duties to their clients. She also stated that the amendments should require written objections to the report.

Council member Leineweber stated that in Richland County, the report writers are generally given eight weeks to prepare the PSI report. He expressed his support for the objectives identified by Council member Stephens, and agreed that structure and deadlines are important. He noted that the proposal gives the court the option of enlarging the time limits and inquired as to whether they could also be shortened. Council member Stephens agreed that the court should have that option, as well.

Council member Ptacek noted that the court should always confirm that the attorney and defendant had an opportunity to review the PSI report prior to sentencing, and that they have no objections to its content. He questioned whether the structure created by the proposal is really necessary to ensure that defense counsel is meeting the expectations of the court. Council member Stephens stated that it may be in this case because there is generally no recourse if defense counsel fails to meet those expectations since it probably doesn't constitute ineffective assistance of counsel.

Council member Wagner agreed with the imposition of deadlines for providing a copy of the report to the attorneys and defendant, as well as a deadline for filing objections with the court, but suggested that the 21-day timeline contained in the current proposal is too long. She suggested perhaps requiring objections to be filed with the court at least 48 hours in advance of sentencing. She added that if the objections are significant, that would allow the judge an opportunity to adjourn the sentencing hearing and instruct the report writer to correct the report. Council member Stephens asked Judge Sankovitz whether an adjournment was a practical option to address report inaccuracies in Milwaukee County. He responded in the affirmative, but added

that the sentencing hearing transcript often serves as the correction to the report, instead of actually ordering the PSI report writer to prepare an amended report.

Council member White stated that the committee drafted the proposal to establish defense counsel's right to receive a copy of the PSI report sufficiently in advance of the sentencing hearing to allow the attorney to adequately review it with the defendant, defendant's right to submit written objections to the court, and the court's duty to act on the written objections. She agreed that the 21-day timeline may not be necessary to achieve this process, and she urged members to consider alternative provisions to accomplish these important goals.

Denise Symdon with the Department of Corrections (DOC) stated that currently DOC's standard is to allow thirty calendar days for the completion of a PSI investigation and report. She expressed concern with shortening that time limit, and stated that agents would be unable to complete the report in its current format if they were given a shorter time frame. Council member Stephens clarified that the current proposal does not impact the length of time DOC agents will be allotted to complete the report. The proposal simply requires that a draft of the report must be provided to the defendant 21 days in advance of the sentencing hearing.

Ms. Symdon also stated that it would be helpful to define what is meant by a significant factual error that would require a correction. Council member Stephens clarified that under the proposal, if DOC is unable to determine whether the error must be corrected, it will go to the judge for a determination prior to sentencing.

Ms. Symdon also raised concerns about DOC making a copy of the PSI report available to the defendant for review prior to sentencing. Council member Stephens stated that the working note following s. 972.15 (2) states that the manner in which to effectuate review by the defendant will be left to local authorities. She clarified that case law already states that defendants have a right to review their PSI reports prior to sentencing, and she noted that defendants also have access to the criminal complaint and discovery materials so it is unlikely that they will learn any new information from the PSI report. She stated that generally the only additional information contained in the PSI report is related to the defendant and/or the defendant's family. She also stated that the PSI report contains the victim's statement, but reminded members that the Council already approved a provision that would require the victim's statement to be severable from the report if the court ordered it protected. The working note also provides several examples regarding how the defendant may be provided access to review the report.

MOTION: Council member Stephens moved, seconded by Council member Shriner, to refer s. 972.15 (2) back to the Appellate Procedure Committee to revise and redraft the section to provide a time limit for the disclosure of the PSI report to counsel and the defendant prior to sentencing; to require written notice of objections to the report content within a set number of days prior to the sentencing hearing; and that the judge resolve the disputed matter prior to imposing sentence; if resolution of the dispute requires additional time, an adjournment is appropriate; and if the court makes a finding that the report contains an error, DOC is required to correct the report. Motion approved unanimously with Council member Roggensack abstaining.

Council member Stephens noted that s. 972.15 (1b) contains a definition of "presentence materials," and it may require further revising subject to further amendments to sub. (2).

## IV. Discussion Regarding Recommendations from the Evidence & Civil Procedure Committee Regarding Evidence and Discovery Rules to Address Inadvertent Disclosure and Clawback

Council member Leineweber introduced proposed amendments to Wis. Stats. §§ 804.01 and 905.03 addressing inadvertent disclosure and lawyer-client privilege. The amendments were studied and drafted by the Evidence & Civil Procedure Committee. Council member Leineweber explained that this rule amendment is a follow-up to the previously adopted rules for the discovery of electronically stored information. The Evidence & Civil Procedure Committee was assisted with the drafting by Judge Sankovitz, Milwaukee County Circuit Court.

Judge Sankovitz provided a brief history of the electronic discovery project, and how it relates to the issue of inadvertent disclosure of privileged and confidential information such as attorney-client communications or attorney work product. The issue has two facets: 1) how courts and parties determine when the disclosure was inadvertent; and 2) what can be done to help manage the costs, especially when dealing with electronic information.

The proposal has three parts to address the identified issues: 1) a clawback rule that instructs the parties how to respond when inadvertent disclosure has occurred; 2) a rule to instruct the parties and the judge how to determine if the privilege has been lost as a result of the disclosure; and 3) a rule addressing when a party can seek additional information as a result of the disclosure. This proposal was motivated by the ever-increasing cost of litigation, especially in cases involving large volumes of electronically stored information where attorney review of the information can be enormously expensive. The proposal is modeled on Rule 502 of the Federal Rules of Evidence.

Judge Sankovitz suggested that the Council consider four questions when reviewing the proposed draft rules. First, consider whether the federal rules are a good model. Second, the proposed rules diverge from the federal rules in a few areas where the federal model does not fit with established Wisconsin law, so members should consider whether those diversions are appropriate. Third, there is no pre-existing Wisconsin law regarding inadvertent disclosure (although *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust,* 2004 WI 57, 271 Wis. 2d 610 addresses deliberate disclosure), so members should consider whether the accompanying note adequately distinguishes the issue. Fourth, the draft commentary is an updated version of its federal counterpart, incorporating cases decided since the federal model was adopted in 2008, so members should satisfy themselves that the guidance is fair.

MOTION: Council member Shriner moved, seconded by Council member Bertz, to approve the draft amendments to Wis. Stats. §§ 804.01 and 905.03 as submitted.

Council member Shriner spoke in support of the motion and stated that there is truly a need for this rule change. The costs for complying with discovery requests can be enormous, especially when they include detailed requests for electronic information, due to the

comprehensive review of the information by an attorney to ensure that privileged materials and work product are not released. This rule helps establish a standard where none currently exists. By adopting a Wisconsin rule modeled on the federal rule, courts and parties will be able to turn to an established body of federal case law to address questions that arise in this area.

Chair Hanan stated that she found the commentary very helpful. She asked whether the committee members discussed moving the rule forward for adoption, and whether they envision presenting it as a stand-alone petition. Council member Leineweber stated that the committee did not specifically discuss it, but he envisions presenting it as a stand-alone petition rather than awaiting completion of a petition addressing the entire recommendations regarding the Wisconsin Rules of Evidence.

Council member Zales received clarification that although this proposed rule change was driven by e-discovery, the new rules will apply to all discovery. He asked whether this rule would allow a party to shift its review obligations to the other side by allowing an attorney to do a very cursory review prior to releasing the information and then asking for it to be returned after the other side reviews it and discovers the privileged information. Judge Sankovitz referenced 905.03 (5) (a) 2., which requires "the holder of the privilege or protection [to take] reasonable steps to prevent disclosure." Judge Sankovitz explained that a cursory review as described in the scenario presented is unlikely to be "reasonable". However, courts are recognizing that software review to isolate privileged and protected information can be reasonable in cases involves very large volumes of information. The use of technology means an attorney may not have to review every piece of information, resulting in a large cost-savings to the client. The question asked by the court is whether the approach to document review is reasonable.

Council member Roggensack noted that s. 804.01 (7) states, "…may promptly present the information to the court." She asked whether it should instead require that the issue may only be brought to the court after the parties have attempted to resolve it. Judge Sankovitz stated that the draft reflects the language in the comparable federal rule. Council member Roggensack also asked for clarification regarding s. 905.03 (b). Judge Sankovitz provided an example in which three pages of an otherwise privileged memo were disclosed and the court ruled that the disclosure was not inadvertent. In that case, the requestor would be able to obtain the rest of the memo if fairness requires full disclosure. This provision provides guidance regarding when it is fair to require the party to provide "the rest of the story."

Council members discussed the use of the term "forfeiture," as opposed to "waiver" and the distinction under Wisconsin law.

ACTION: Motion passed unanimously with Council members Roggensack and Ott abstaining.

Judge Sankovitz added that prior to filing a rule change petition seeking approval of the proposed amendments, he recommends that the committee seek additional comments and feedback from the bench and bar. Chair Hanan agreed that additional feedback would be helpful. The committee will also need to give additional consideration to whether this proposal should be introduced as a supreme court rule change or whether legislation is appropriate.

Council member Ott offered to work with the Council on this proposal if the Council elects to introduce legislation.

## V. Committee Reports

### A. Appellate Procedure

Chair Hanan reported that the Appellate Procedure Committee met on March 7th and continued to study the issue of ghostwriting. The committee is developing a recommendation for a PPAC subcommittee that is studying the broader topic of limited scope representation. The committee plans to meet again prior to the next regularly scheduled Council meeting.

### B. Criminal Procedure

There was no report.

### C. Evidence and Civil Procedure

Council member Leineweber reported that at its last meeting, the Evidence & Civil Procedure Committee continued its review of the rules of evidence, pursuant to the work plan approved by the Council.

## VI. Other Business

### A. PPAC Liaison's Report

There was no committee report.

## VII. Adjournment

Chair Hanan announced that the next regular Council meeting is April 15th.

Council member Ptacek formally thanked Marquette University Law School and Dean Kearney for the hospitality extended in hosting the Council meeting. Chair Hanan will also follow up with a thank you letter.

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