WISCONSIN LEGISLATIVE COUNCIL

SUPERVISED RELEASE AND DISCHARGE OF SEXUALLY VIOLENT PERSONS

Room 412 East
State Capitol

October 4, 2012
10:00 a.m. – 3:15 p.m.

[The following is a summary of the October 4, 2012 meeting of the Special Committee on Supervised Release and Discharge of Sexually Violent Persons. The file copy of this summary has appended to it a copy of each document prepared for or submitted to the committee during the meeting. A digital recording of the meeting is available on our Web site at **http://www.legis.state.wi.us/lc**.]

Call to Order and Roll Call

Chair Strachota called the committee to order. The roll was called and a quorum was present.

COMMITTEE MEMBERS PRESENT:	Rep. Pat Strachota, Chair; Rep. Louis Molepske, Jr.; Sens. Tim Cullen and Mary Lazich; and Public Members Mark Bensen, Michael Bohren, Ron Cramer, Ian Henderson, Frank Liska, Rick Oliva, and Anthony Rios.
COMMITTEE MEMBERS EXCUSED:	Sen. Alberta Darling, Vice Chair; and Public Members Rebecca Dallet and Shari Hanneman.
COUNCIL STAFF PRESENT:	Katie Bender-Olson and Michael Queensland, Staff Attorneys.
APPEARANCES:	Judge Michael Bohren, Waukesha County Juvenile Court; and Michael Schaefer, Department of Justice (DOJ).

Approval of the Minutes of the Committee's September 19, 2012 Meeting

Senator Darling moved, seconded by Mr. Bohren, that the minutes of the committee's September 19, 2012 meeting be approved. Following discussion, the motion was approved by unanimous consent.

Chair Strachota made several comments regarding the proposed minutes. The minutes reflect a statement by Grace Roberts of the Department of Corrections (DOC) that an individual discharged from commitment under ch. 980 may refuse to wear a GPS device, though no individual has refused to date. The minutes also reflect Chair Strachota's subsequent statement that the issue may need to be addressed, but that it falls outside the scope of the Special Committee's charge. Chair Strachota clarified that the minutes for the September 19th meeting should reflect her statement that the Special Committee may include a recommendation that the Legislature address the issue within the Special Committee's final report.

Additionally, the minutes reflect a statement by Assistant District Attorney Holly Bunch that was addressed by Chair Strachota. Ms. Bunch stated that Milwaukee County is unable to stipulate to supervised release for certain individuals committed under ch. 980 because the county is unable to provide housing for these individuals. Chair Strachota expressed concern that committed individuals may be discharged because supervised release is not available in Milwaukee County and commented that the Special Committee may consider making a related recommendation in its final report. Following her comments, agency staff from the Department of Health Services (DHS) clarified that supervised release is available in Milwaukee County and that one individual is currently on supervised release and two individuals are expected to be placed within the county in the near future.

Presentation by Invited Speaker from the Wisconsin Court System

Judge Michael Bohren, Waukesha County Juvenile Court

Judge Bohren provided a judicial perspective on ch. 980 supervised release and discharge proceedings and the proposed legislative options before the committee. He began by describing his personal experience with ch. 980 cases and presenting statistics regarding initial commitment, supervised release, and discharge filings in Waukesha County from 1994 to the present. Judge Bohren noted that Waukesha County addressed 26 commitment filings during this period, and that he was assigned five of the 26 cases. He further noted that one petition for supervised release was granted in Waukesha County between 1994 and 2012 and that four petitions for discharge were granted.

Judge Bohren also addressed two Wisconsin cases resolving questions specific to ch. 980 supervised release and discharge. He described the fact patterns in *State v. West*, a supervised release case, and *State v. Ermers*, a discharge case, and provided any available information regarding the current status of each individual. Judge Bohren also explained the rule of law resulting from each decision.

Judge Bohren next provided his analysis of options for legislation presented to committee members in Memo No. 1, *Options for Study Committee Consideration*. He first addressed the assignment of the burden of proof for establishing criteria required for supervised release presented in two opposing options. Judge Bohren recommended codifying the *West* decision and assigning the burden of proof to the petitioner.

Judge Bohren next addressed an option for legislation that would grant courts authority to order supervised release based upon a stipulation between the parties. He noted that supervised release by stipulation is not good judicial policy because it permits the court to grant supervised release without hearing evidence regarding the statutorily required criteria. Judge Bohren noted that he was uncomfortable with this legislative option.

Judge Bohren next discussed an option for legislation that would revise or eliminate the criterion requiring "significant progress in treatment" before a committed individual may be granted supervised release. He expressed concern regarding this legislative option and questioned why a committed individual should be granted supervised release without showing significant progress in treatment.

Judge Bohren also addressed an option for legislation that would expand the permitted activities for which an individual on supervised release may leave his residence with an escort. He noted that the list of expanded activities, comprised of volunteer activities, education, treatment, exercise, and residential maintenance, appeared reasonably related to the purposes of ch. 980.

Next, Judge Bohren discussed an option for legislation that would require a committed individual to show a change in his condition occurring since the most recent determination that the individual remains a sexually violent person. He noted that a discharge pleading requirement that only looks back as far as the most recent determination prevents a judge from looking at the totality of the circumstances. Judge Bohren stated that, as a judge, he believes review of the entire record is important in making any decision. Further, he does not consider the current discharge petition procedure to be overly burdensome to the court system. Judge Bohren also noted that the rotation of judges within a county means that the same judge will not address every discharge petition filed by a committed individual and any newly assigned judge should "take a fresh look" at the case and be able to review all the relevant information.

Judge Bohren then addressed an option for legislation that would amend inconsistent language appearing within s. 980.09, Stats. He acknowledged that the statute alternates between describing a court's task in reviewing a discharge petition as determining whether a petition "contains facts," and determining whether "facts exist;" phrases that may have different meanings. However, Judge Bohren indicated that the resulting court review is the same and questioned whether the language creates a problem for practitioners.

Judge Bohren next discussed an option for legislation that would limit the frequency with which a committed individual could file a discharge petition to once per year. He emphasized that an individual who no longer meets the definition of a "sexually violent person" should not be held and noted that an individual may prevail on a subsequent discharge petition by reframing his arguments. Judge Bohren further stated that an unlimited ability to file discharge petitions does not overly burden the court system because the court merely reviews the sufficiency of the petition.

Judge Bohren also addressed an option for legislation that would grant courts authority to allow continuances and adjournments for cause in discharge hearings. He noted that flexibility in court proceedings is important, particularly in the context of ch. 980 cases, because of the involved and time-consuming nature of these cases. Judge Bohren believes that allowing reasonable delays for good cause is rational.

Judge Bohren then discussed an option for legislation that would require supervised release before an individual may be discharged from ch. 980 commitment. He noted that directly discharging an individual often means placing that individual into the community without the tools to function safely. However, Judge Bohren reiterated that the state cannot constitutionally hold an individual who no longer qualifies as a "sexually violent person."

Next, Judge Bohren addressed an option for legislation that would change the definition of a sexually violent person from one "likely" to commit a new offense to one who poses an "unreasonable

risk" of reoffense. He submitted that a standard such as "unreasonable risk" is too difficult for a fact-finder to quantify. Judge Bohren suggested that consistency in the standard is preferable and that the current definition should be maintained. Mr. Liska provided comments on the topic and advocated for eliminating the use of a numerical measurement of 50% likely to reoffend. Mr. Liska distributed a recent Wisconsin Court of Appeals case, *State v. Thunder*, for consideration by the committee and noted that the petitioner's probability of reoffense in the case was one in three. Committee members discussed whether the Legislature should specify that an individual only merits a discharge hearing if the risk assessment score gauging his likelihood of reoffense changes by a particular amount. Mr. Liska responded that courts should retain discretion and that each case should be weighed individually.

Finally, Judge Bohren discussed an option for legislation that would allow DHS to place female sexually violent persons at the Wisconsin Women's Resource Center. He expressed agreement with the recommendation.

The committee members posed several questions to Judge Bohren following his presentation. Members addressed his statement that judges should be allowed to view the totality of the circumstances by reviewing the entire case file. In response to a question regarding the judiciary's role, Judge Bohren stated that the court must balance protection of the public with protection of an individual's rights when addressing ch. 980 cases. Judge Bohren answered a subsequent question regarding the appropriateness of requiring treatment progress before discharge by noting that hard and fast rules are not advisable. Judge Bohren responded that he could imagine an individual who has refused treatment during his commitment, but who no longer qualifies as sexually violent person, such as an individual who is incapacitated by a stroke.

Description of Department of Justice Legislative Options Memorandum

Michael Schaefer, Assistant Attorney General, DOJ

Assistant Attorney General Schaefer distributed a memorandum to committee members and explained the legislative options outlined in the memorandum. Mr. Schaefer explained that the options were consistent with his understanding of the committee's objective – to determine whether an imbalance exists between supervised release and discharge, and if such an imbalance exists, to recommend changes so that a court is more likely to order supervised release than discharge. Mr. Schaefer described many of the legislative options as enacting procedural changes that would streamline the ch. 980 process and remove contradictions within the statutory language of the chapter.

Mr. Schaefer first noted that DOJ agrees with the legislative options proposed by DHS, including the option which would change the "significant progress in treatment" criterion for supervised release. He noted that the change would provide flexibility for courts and for the agency without wholly removing the requirement that an individual be making progress in treatment. Mr. Schaefer also commented on the legislative option for shifting the burden of proof to the committed person at a discharge trial. He stated that the option appears unconstitutional based upon *State v. Foucher*, a 1972 U.S. Supreme Court case relating to mental health commitments.

Mr. Schaefer next discussed the legislative options proposed by DOJ in its memorandum. He initially highlighted the DOJ proposal altering the discharge pleading requirement a petitioner must meet before receiving a discharge hearing. Mr. Schaefer explained that current law appears to impose a plausibility standard and does not allow a court to engage in any weighing of evidence. Under current

law, if a petitioner alleges facts from which a jury *may* conclude his condition has changed such that he no longer qualifies for commitment, then the court must order a discharge hearing. Mr. Schaefer suggested that the standard be changed such that a petitioner may only receive a discharge hearing if his petition alleges facts from which a court or jury *would likely conclude* that his condition had sufficiently changed. He further proposed that the alleged facts must show the petitioner's condition had changed since initial commitment *or* since the most recent determination denying discharge to warrant a discharge hearing.

Mr. Schaefer then explained the DOJ proposal creating consistency in the statutory language regarding periodic reexamination of a committed individual and treatment progress reports. Mr. Schaefer noted that the proposed change clarifies that a court must appoint an examiner for the individual upon the individual's request.

Mr. Schaefer next discussed DOJ's proposal to repeal s. 980.075, Stats., which addresses the petition process, and to incorporate certain of its subsections into ss. 980.08 and 980.09, Stats. He noted that the current statutory section contains procedural requirements that would be more appropriately contained in other statutory sections, and that certain provisions of s. 980.075 are inconsistent with provisions of ss. 980.08 and 980.09, Stats.

Mr. Schaefer then explained the DOJ proposal requiring that when a court holds a discharge trial, the court also consider and make a determination regarding supervised release. He explained that immediate consideration of supervised release is efficient use of court resources because the parties are already present and all the relevant evidence is before the court. Mr. Schaefer further explained that in addition to requiring a determination regarding supervised release at each discharge trial, the DOJ proposal would prohibit a committed individual from filing another petition for supervised release until 12 months after the court's determination. Committee members inquired whether the proposal was problematic because it would require a court to consider supervised release even if the individual did not want the court to consider supervised release. Mr. Schaefer responded that the requirement was not constitutionally problematic, given that a commitment scheme is not required to provide supervised release at all to be constitutional. He explained that any problems arising from the proposal would be procedural; because the committed individual bears the burden of proof at supervised release, an individual who does not wish to argue for supervised release may decide not to present any evidence for consideration by the court.

Next, Mr. Schaefer discussed the DOJ proposal extending the deadline for an examiner to furnish a written examination report to the court from 30 days to 60 days, and extending the deadline for holding a supervised release hearing after the filing of the report from 30 days to 120 days. Mr. Schaefer noted that the current deadlines are too short and often cause difficulties for scheduling expert witnesses. He explained that the proposal provides more flexibility for courts and parties.

Mr. Schaefer proceeded to explain that DOJ agrees with proposed codification of the finding in *State v. West*, which places the burden of proof regarding supervised release criteria on the committed individual. He further noted that DOJ agrees with the DHS proposal to amend the current supervised release criterion regarding "significant progress in treatment."

Mr. Schafer then discussed provisions of current s. 980.075, Stats., which DOJ proposes to move into other sections of the chapter. He also explained the proposed creation of a new subsection providing that if the examiner files a report supporting discharge, then the court must appoint that examiner as the individual's court-appointed examiner. Representative Molepske inquired about

language within the proposed statutory section stating that the county shall pay the costs of the court-appointed examiner and questioning the wisdom of using county funding to compensate an examiner who is a state employee with DHS. In response to Representative Molepske's question, DHS staff clarified that a DHS evaluator who files a report and then testifies at a discharge hearing is funded by DHS and not by the county. An examiner is only funded by the county if the examiner is appointed independently.

Finally, Mr. Schaefer explained the DOJ proposal requiring a committed individual to file a request for a jury trial in discharge proceedings within 10 days of the court's determination that a discharge hearing is warranted, rather than within 10 days of the filing of the discharge petition. The current deadline requires parties to request a jury before knowing whether a discharge hearing will be held. Mr. Schaefer also explained a proposal requiring a court that orders supervised release or discharge to stay execution of the order for a period of time, such as 15 days. He explained that this stay would allow DOC to arrange for GPS monitoring of the individual prior to release.

Following Mr. Schaefer's remarks, the Special Committee members asked that the DOJ proposals be drafted for consideration at the next meeting. Mr. Schaefer also responded to a committee member question regarding his opinion of the current definition of "sexually violent person," and its requirement that an individual be "likely" to reoffend. Mr. Schaefer noted that the ch. 980 commitment does not require a numerical definition of dangerousness to be constitutional. He further stated that changing the definition may be beyond the scope of the Special Committee and that DOJ has no current proposal to alter the definition.

Committee members engaged in brief discussion following the conclusion of Mr. Schaefer's remarks. Individuals from DOC and DHS in the audience responded to comments and questions raised by committee members regarding the first year of supervised release and the requirement for direct supervision of all out-of-residence activities. DOC personnel noted that direct escort services are contracted through a bid process and that the currently contracted company puts employees through a background check and hiring process before they may serve as escorts. DHS personnel noted that "supervision" activities should be added to the list of permitted purposes for a committed individual to leave his residence with an escort.

Discussion of Materials Distributed and Committee Discussion

Katie Bender-Olson and Mike Queensland, Staff Attorneys with the Legislative Council, described Memo No. 1, *Options for Study Committee Consideration*, by providing a summary of each option contained in the Memo. Following the summary of each option, the committee discussed the option and indicated whether the committee wished to have draft legislation prepared.

Ms. Bender-Olson described the first two contradictory options at the same time. She explained that the first option codifies the Wisconsin Supreme Court's holding in *State v. West*, and assigns the burden of proof for establishing the supervision release criteria to the committed individual. She then explained that the second option supplants the holding in *State v. West* and assigns the burden of proof to the state, rather than the committed individual. The committee requested that staff draft the first option placing the burden of proof on the committed individual and decided not to request a draft of the second option.

Ms. Bender-Olson next described a legislative option requiring a committed individual to establish that his condition has changed since the most recent determination that he remains a sexually violent person, rather than since the date of his initial commitment order. Committee members posited that the proposed change is unnecessary because the committee already requested that the DOJ proposal regarding the discharge petition pleading requirement be incorporated into draft legislation. Mr. Rios noted that the DOJ proposal goes beyond the proposal described in Memo No. 1. Consequently, the committee requested that staff draft the legislative option as it appears in Memo No. 1, in addition to drafting the DOJ proposal.

Next, Ms. Bender-Olson described the legislative option rectifying inconsistent language used to describe a court's task in reviewing a discharge petition. Committee members noted that the problem was addressed by DOJ's proposed changes to the statutory section. The committee decided not to request a draft of the proposal.

Ms. Bender-Olson then described the legislative option authorizing a court to grant supervised release based upon a stipulation by the parties, even if the committed person does not strictly meet all five criteria for supervised release. Committee members questioned whether the option was necessary given an alternative proposal to amend the supervised release criterion relating to "significant progress in treatment." Mr. Schaefer noted that the issue primarily arises when there is a risk that an individual may be discharged, but the individual would agree to supervised release instead. However, he commented that a court must still make the necessary findings on required criteria, regardless of whether the parties stipulate to those criteria. The committee decided not to request a draft of the proposal.

Mr. Queensland then described the legislative option revising the criterion for supervised release requiring that a committed individual "has made" significant progress in treatment. The proposal amends the criterion to require that the individual "is making" significant progress in treatment and amends the definition of significant progress to show that the individual is making progress towards each of the requirements, rather than showing he has completed the requirements. The committee requested that staff draft the legislative option.

Next, Mr. Queensland described the legislative option shifting the burden of proof at a discharge trial from the state to the committed individual. The option was previously addressed by Mr. Schaefer, who opined that the option would be unconstitutional. The committee decided not to request a draft of the proposal.

Mr. Queensland then described the legislative option limiting the frequency with which a committed individual may file a discharge petition. Committee members questioned whether the current procedures are problematic for courts and whether limiting the ability to petition for discharge raises constitutional issues. The committee decided not to request a draft of the proposal.

Mr. Queensland next described the legislative option granting courts explicit authority to allow continuances and adjournments for cause in discharge hearings. Committee members noted that the issue was addressed by one of the DOJ proposals which staff had already been asked to draft. The committee decided not to request a draft of the proposal appearing in Memo No. 1.

Mr. Queensland then described the legislative option denying a discharge hearing to a committed individual unless he has previously been on supervised release. Committee members noted that Mr. Schaefer opined that such a requirement is likely unconstitutional. The committee decided not to request a draft of the proposal.

Next, Mr. Queensland described the legislative option amending the definition of "sexually violent person" to include a lower threshold level of reoffense risk. The option proposed changing the definition to require that the individual pose an "unreasonable risk" of committing a new act of sexual violence. Mr. Schaefer later noted that he is researching the constitutional "floor" for reoffense risk, but stated that DOJ was not proposing a lowering of the threshold. The committee decided not to request a draft of the proposal.

Mr. Queensland then described the legislative option expanding the list of activities for which a committed individual on supervised release may leave his home under direct supervision. Committee members stated that the proposed list of expanded activities should also include supervision activities, so that an individual may visit his probation or other appropriate officer. The committee requested that staff draft the legislative option.

Finally, Mr. Queensland described the legislative option allowing DHS to place females committed under ch. 980 at the Wisconsin Women's Resource Center. The committee requested that staff draft the legislative option.

Other Business

Chair Strachota announced that the next meeting of the Special Committee on Supervised Release and Discharge of Sexually Violent Persons is scheduled for Wednesday, November 14, 2012. The meeting will be held in the Wisconsin Legislative Council offices.

Adjournment

The meeting was adjourned at 3:15 p.m.

KBO:MQ:ksm