STATE OF WISCONSIN

SUPREME COURT

In re:

WISCONSIN STATUTES §§ 901.07, 906.08, 906.09, and 906.16

MEMORANDUM IN SUPPORT OF PETITION OF WISCONSIN JUDICIAL COUNCIL FOR AN ORDER AMENDING WIS. STATS. §§ 901.07, 906.08, 906.09; AND CREATING WIS. STAT. § 906.16

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

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INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ 901.07, 906.08(2), and 906.09; and create WIS. STAT. § 906.16. This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

DISCUSSION

I. Judicial Council Study and Drafting Process

This rule change petition is one in a series resulting from a multi-year study of Wisconsin's Rules of Evidence conducted by the Wisconsin Judicial Council. This complex project began on March 20, 2009, when Marquette University Law School Professor Daniel Blinka gave a presentation to the Judicial Council highlighting changes that he believed would improve Wisconsin's evidentiary rules.[1] He explained that in formulating his recommendations, he sought input from approximately one hundred circuit court judges. Professor Blinka suggested that the Judicial Council conduct a study and recommend amendments to codify Wisconsin case law, correct deficient rules, and fill some gaps in the rules.

[1] Minutes of the Wisconsin Judicial Council, dated March 20, 2009 at http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0309.pdf (last accessed January 12, 2016).

The Judicial Council tasked its Evidence & Civil Procedure Committee with creating a work plan to undertake the project. The work plan included both the individual topics to be studied, as well as a process for the work to be accomplished. [2]

The committee proposed the following topics for study:

- Wis. Stat. § 901.07 the rule of completeness;
- Wis. Stat. § 904.12, the rule governing statements by injured persons;
- Wis. Stat. § 885.16, the Dead Man's statute;
- Wis. Stats. 904.04(2), the "other act" rule, including the Sullivan test;
- Wis. Stat. § 906.08, evidence of a witness's character for truthfulness;
- Wis. Stat. § 906.09, impeachment by prior criminal conviction;
- Wis. Stat. § 907.03 or § 907.05, the disclosure of an expert witness's inadmissible bases;
- Wis. Stat. § 908.01, the definition of hearsay;
- Wis. Stat. § 908.045 (2), the hearsay exception for statements of recent perception;
- Wis. Stat. § 908.03(6), business records;
- Creation of a bias rule;
- Spoliation of evidence;
- Rule 502 of the Federal Rules of Evidence; and
- Creation of an expert witness privilege rule (codification of Alt).

With regard to process, the committee confined its work to one or two rules at a time. When the committee determined that specialized expertise would be helpful to its work, guest speakers were invited to attend and offer comments and recommendations.

The committee studied each rule contained in the work plan, and discussed proposed amendments in advance of the Judicial Council's discussion of those items. When the issue was discussed by the full Council, the committee members acted as knowledgeable discussion facilitators. The committee also offered the Judicial Council a recommendation for each rule studied.

[2] Memorandum from Evidence & Civil Procedure Committee to Wisconsin Judicial Council, dated April 23, 2009 (copy on file with author).

Over the course of the Council's work on the rules, a few amendments to the work plan were approved. At the request of the Legislative Reference Bureau, Wis. Stat. § 885.205, privilege for communications between a student and a dean of students or a school psychologist, was added to the study. Three topics were removed from the work plan and designated for individual study and action by the Judicial Council, including spoliation of evidence, the expert witness privilege under the *Alt* case, and Rule 502 of the Federal Rules of Evidence.

The Council previously completed its work regarding Rule 502 of the Federal Rules of Civil Procedure. As a result of its study, the Judicial Council proposed amendments to Wis. Stats. §§ 804.01, 805.07 and 905.03 relating to inadvertent disclosure of protected or privileged information based on the federal model. The amendments were adopted by supreme court order, and became effective January 1, 2013.[3] The Council anticipates that a recommendation regarding spoliation of evidence and a recommendation regarding the expert witness privilege created by the *Alt* case will be issued in the near future.

The Council has completed its work on the remaining evidentiary rules listed in the work plan. In February 2015, the Council circulated the proposed amendments to potentially interested groups, including the following: Wisconsin State Bar, Milwaukee County Bar Association; Dane County Bar Association; Western District Bar Association; Eastern District Bar Association; Wisconsin Association for Justice;

[3] 2012 WI 114.

Wisconsin Defense Counsel; State Public Defender's Office; Department of Justice; Committee of Chief Judges; Judicial Conference Legislative Committee; Court of Appeals Judges; Wisconsin Association of Criminal Defense Attorneys; Wisconsin District Attorneys Association; Association of State Prosecutors; Professor Keith Findley, University of Wisconsin Law School; and Professor Daniel Blinka, Marquette Law School. It was requested that they share the proposed changes with colleagues or members and provide any comments or feedback to the Judicial Council by May 14, 2015.[4]

The State Bar also published an article on the proposed changes to the evidence rules, including a notice to its readership that public feedback and comments were invited by the Judicial Council.[5]

The Council accepted comments until May 14, 2015. No objections to the proposed amendments were received, although a question from the committee of chief judges resulted in a recommendation to make an additional minor amendment to one of the rules.[6]

As a result of this lengthy study, the Judicial Council recommends amendment of three rules and the creation of new rule, as set forth in the accompanying petition. The

[4] Correspondence to potentially interested parties from April Southwick, dated February 13, 2015 (copies on file with author).

[5] Wisconsin State Bar's INSIDE TRACK, Vol. 7, No. 4 (February 18, 2015).

[6] Memorandum from Evidence & Civil Procedure Committee to Wisconsin Judicial Council, dated October 9, 2015 (copy on file with author); Minutes of the Wisconsin Judicial Council, dated October 16, 2015 at http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes1015.pdf (last accessed January 12, 2016).

Judicial Council also recommends the repeal of several evidentiary rules, addressed in a separate petition.

II. Recommended Amendments

A. Wis. Stat. § 901.07, Remainder of or related writings or recorded statements

Often referred to as the rule of completeness, Wisconsin's Rule 901.07 focuses on written utterances, which has caused confusion regarding the rule's application to oral statements. The Judicial Council recommends amending this rule to specifically address unrecorded oral statements. This recommendation is a move away from federal Rule 106 upon which Wisconsin's rule is currently based, and more closely aligns Wisconsin's rule with the common law doctrine of completeness, consistent with Wisconsin case law.

In *State v. Eugenio*, the defense extensively cross-examined the victim about perceived inconsistencies in her statements to other individuals.[7] Under Rule 901.07, the court permitted the State to offer the challenged statements in their entirety, to show consistency on significant factual issues. On review, the court observed that while "Wis. Stat. § 901.07 references only written or recorded statements, the court in *State v. Sharp*, 180 Wis.2d 640, 511 N.W.2d 316 (Ct.App.1993), determined that a common law rule of completeness continues to exist for oral statements in Wisconsin."[8]

The Judicial Council recommends the following amendment:

> When any part of a ~~writing or~~ recorded or unrecorded statement ~~or part thereof~~ is introduced by a party, an adverse party may require

[7] 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998).
[8] *Id.* at 650.

> the party at that time to introduce any other part or any other ~~writing or recorded~~ statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

This amendment is consistent with *State v. Eugenio*, which acknowledged that the rule of completeness is applicable to oral testimony, and with *State v. Anderson*, which provided guidance on how, and when, to apply the rule of completeness.[9] "The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule…'[A]n out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously.' "[10]

This move to recognize oral statements is not a novel concept. At least five other states which track federal Rule 106 allow the introduction of oral statements, including Iowa, Maine, Montana, Nebraska, and Oregon.[11] The rule of completeness is a

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[9] *State v. Eugenio*, 219 Wis.2d 391, 410, 579 N.W.2d 642, 651 (1998) and *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1991), review denied, 230 Wis.2d 275, 604 N.W.2d 573 (1999).

[10] *Eugenio*, 219 Wis.2d at 412 (citations omitted).

[11] IOWA R.EVID. 5.106; *State v. Johnson*, 479 A.2d 1284, 1290 (Me.1984) (recognizes that Maine Rule of Evidence 106 applies to oral statements); M.R. EVID. 106 (comment acknowledges rule is based on federal rule and also codifies Montana case law "so that scattered fragments of the rule of completeness do not have to be searched for when the rule is to be applied"); NEB.REV.STAT. § 27-106; and OR.REV.STAT. § 40.040 (rule was

discretionary provision aimed at facilitating the presentation of clear, undistorted evidence to the fact finder. Expanding Wis. Stat. § 901.07 to specifically include oral statements will enhance the rule's ability to meet its purposes and bring the rule back to its common law form.

The drafting committee also considered a proposal that would have required the trial judge to conduct an evaluation outside the presence of the jury by *voir dire* examination to determine whether the proposed additional evidence should be introduced contemporaneously. Ultimately, it was rejected because some members of the drafting committee felt that it could be misused by opposing counsel to break the flow of testimony. Members of the drafting committee concluded that the judge should have discretion to determine the most appropriate procedure on a case-by-case basis.

B. Wis. Stat. § 906.08, Evidence of Character and Conduct of Witness

Wisconsin's Rule 906.08 is modeled on federal Rule 608. In 2003, Rule 608 of the Federal Rules of Evidence was amended. The Judicial Council recommends an amendment to Wis. Stat. § 906.08(2) to keep the Wisconsin rule consistent with its federal counterpart.

The Judicial Council recommends the following amendment:

> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's ~~credibility~~ character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved

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replaced "with language intended to reflect the actual case-law interpretation of that statute").

> by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross−examination of the witness or on cross−examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

The federal 2003 Advisory Committee Note to Rule 608 states:

> On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." (citing American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d ed. 1998)). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity.

As the Advisory Committee Note further explains, limiting the application of the rule to proof of a witness' character for truthfulness leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to other rules of more specific applicability, such as Rule 402 and Rule 403.

The proposed amendment to Rule 906.08 would also maintain internal consistency within Wisconsin's rules. Narrowing the exclusion of extrinsic evidence in s. 906.08 (2) clarifies the admissibility of extrinsic evidence offered for other grounds of impeachment, such as under the newly proposed bias rule contained in Part III of this petition. [12]

[12] "The trial court articulates that Wicklund's conduct relating to the dismissed OWI charge was not admissible because evidence of character or conduct of a witness cannot be proven by extrinsic evidence. This is based on an accepted legal standard, pursuant to § 906.08(2), Stats., which prohibits the use of extrinsic evidence regarding acts of

C. Wis. Stat. § 906.09, Impeachment by Evidence of Conviction of Crime

Upon beginning its study of Wis. Stat. § 906.09, one of the Judicial Council's Evidence & Civil Procedure Committee's first observations was that the Wisconsin rule differs substantially from its federal counterpart, Rule 609. When compared to the current Wisconsin rule, the federal rule is much more restrictive in terms of crimes that can be used for impeachment purposes.[13]

The committee initially studied a law review article by Cornell Law Professor John Blume proposing that only prior convictions for perjury should be potentially available for impeachment purposes.[14] Professor Blume presents a study which suggests that factually innocent defendants with criminal records refuse to testify on their own behalf at substantially higher rates than criminal defendants generally.[15] His article also suggests that jurors are likely to believe that a defendant who does not testify in his or her own defense is guilty.[16]

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specific conduct. Although this is an appropriate conclusion of the law regarding specific acts, it does not apply to witness bias." *County of Iron v. Nichols*, 189 Wis. 2d 493, 527 N.W.2d 400 (Ct. App. 1994).

[13] FED. R. EVID. 609 ("…the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.")

[14] Blume, John H. "The Dilemma of the Criminal Defendant with a Prior Record - Lessons from the Wrongfully Convicted" (2008). Cornell Law Faculty Publications. Paper 83. http://scholarship.law.cornell.edu/lsrp_papers/83

[15] *Id.* at 489.

[16] James Beaver & Steven Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 Temp. L.Q. 585, 587 (1985) ("Jurors expect innocent defendants to respond to false criminal accusations. From silence jurors draw an inference of guilt. The defendant who appears to withhold reluctant information is likely to be viewed as guilty."); see also Wigmore, Evidence § 2272, p. 426 (McNaughton rev.

In response to the Blume study, some members of the committee questioned the fairness of Wisconsin's current rule, and discussed whether there should be a different impeachment rule for defendants in criminal cases where liberty is often at stake. Members also reviewed the results of a fifty state survey of similar rules used in other jurisdictions.[17] Approximately half of the states have adopted the federal rule or a rule substantially similar to the federal model.

After conducting extensive research, the drafting committee focused its study on the following possible recommendations:

- Adopt the federal rule
- No change to current rule
- Judicial education
- Codify factors found in case law

At the committee's invitation, Professor Keith Findley, University of Wisconsin Law School's Innocence Project; Assistant Attorneys General Roy Korte and Rebecca St. John, Department of Justice; and Appellate Division Director Marla Stephens, State Public Defender's Office, appeared before the committee to provide additional perspective on the rule. The discussion focused on sub. (2), exclusion.

1961) ("What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of a crime."); Lewis Mayers, Shall We Amend the Fifth Amendment 21 (1959).

[17] Bill Gleisner and Matthew Surridge, "Multistate Survey: How other States Handle Impeachment by Evidence of Conviction of a Crime" (submitted to the Judicial Council's Evidence & Civil Procedure Committee May 27, 2011).

The Department of Justice favored maintaining current law, and indicated that the district attorneys also generally favored retention of current law. Professor Findley reported that in his work with the Innocence Project, he frequently hears complaints that defense counsel believed the defendant could not be placed on the witness stand because of a prior criminal history. He expressed his preference for a rule such as the federal model because the federal rule makes it clear that the court is only to admit evidence of convictions that involved either perjury or some element of clear dishonesty. The State Public Defender's office advocated amending the rule to bring it in line with current Wisconsin case law, noting such an approach is consistent with the Judicial Council's charge to improve efficiency, and should not adversely impact appeals since it is already settled law.

Judicial members of the Evidence & Civil Procedure Committee observed that when applying s. 906.09, the trend has been moving toward greater analysis by the judge. The result is that more convictions are now excluded, especially if they are very old convictions. Committee members considered the guidance available to the court for conducting an analysis to exclude convictions under sub. (2), and generally agreed that the current rule does not provide sufficient guidance within the text of the rule.

In response, the committee considered several options. Members discussed codification of the criteria found in case law, noting that such an amendment may be particularly helpful to inexperienced attorneys and judges who are new to the bench. The committee also considered the impact of a recommendation to adopt the federal model, observing that adopting a rule based on the federal model could cause uncertainty in the

law by disrupting Wisconsin precedent, but it could also result in efficiencies because it opens up a large body of settled federal case law. Ultimately, the committee agreed that codification of the criteria found in Wisconsin case law was a balanced approach that would meet the needs of practitioners and the courts, while respecting the concerns raised by prosecutors.

Prior to finalizing a recommendation, the drafting committee prepared several alternative drafts and submitted them to the Judicial Council's Criminal Procedure Committee for comment. The drafting committee found the Criminal Procedure Committee's comments to be persuasive and forwarded the draft favored by that committee on to the full Judicial Council for consideration.

The Judicial Council recommends the following amendment:

(1) General rule. For the purpose of attacking ~~the~~ credibility, ~~of~~ a witness~~, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.~~ may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. ~~The party cross-examining the witness is not concluded by the witness's answer.~~ If the witness's answers are consistent with the previous determination of the court pursuant to subsection (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the credibility of the witness.

(2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for impeachment purposes include:
(a) The lapse of time since the conviction.
(b) The rehabilitation or pardon of the person convicted.
(c) The gravity of the crime.
(d) The involvement of dishonesty or false statement in the crime.
(e) The frequency of the convictions.
(f) Any other relevant factors.

(3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the ~~judge~~ court determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

The amendment to sub. (1) is intended to conform the rule more closely to current practice. It is consistent with *Nicholas v. State* and *State v. Bailey*.[18] The amendment recognizes that the court can, and often does, conclude that the "correct" number of convictions for impeachment at a given trial is a number less than the "truthful and accurate" number.

The amendment to sub. (2) continues to recognize the long-standing principle that this statutory exclusion is a "particularized application" of s. 904.03.[19] It codifies the holding in *Gary M.B.* that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors.[20] In *Gary M.B.*, the majority observed that "in the future, it would be prudent for circuit courts to explicitly set forth their reasoning in ruling on § 906.09(2) matters in order to demonstrate that they considered the relevant balancing factors applicable in the case before them."[21] Chief

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[18] *Nicholas v. State*, 49 Wis.2d 683, 183 N.W.2d 11 (1971) and *State v. Bailey*, 54 Wis.2d 679, 690, 196 N.W.2d 664, 670 (1972).
[19] *State v. Gary M.B.*, 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 81, 676 N.W.2d 475, 485.
[20] *Id.* at majority op., ¶ 21; Chief Justice Abrahamson's dissent, ¶ 56; Justice Sykes' dissent, ¶ 85, *State v. Kuntz*, 160 Wis.2d 722, 752, 467 N.W.2d 531 (1991); *State v. Kruzycki*, 192 Wis.2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *State v. Smith*, 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996).
[21] 2004 WI 33, ¶ 35, 270 Wis. 2d 62, 87-88, 676 N.W.2d 475, 488.

Justice Abrahamson notes, "[t]he purposes of requiring a circuit court to perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system."[22]

The proposed Judicial Council Note accompanying the recommended amendment clarifies that in conducting the balancing test, the circuit court need only consider those factors applicable to the case.[23] The proposed Judicial Council Note also explains that the list of factors does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule.[24]

III. Creation of Bias Rule

The Judicial Council recommends creating the following rule:

> 906.16. Bias of Witness. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

The United States Supreme Court has recognized the propriety of impeaching with evidence of bias, prejudice, or interest, despite the fact that such a medium of impeachment, long recognized at common law, is not expressly mentioned in the Federal Rules of Evidence.[25]

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[22] *Id.* at Chief Justice Abrahamson's dissent, ¶ 48.
[23] *Kuntz*, 160 Wis.2d at 753, 467 N.W.2d 531.
[24] *State v. Anderson*, 160 Wis.2d 435, 437 (Ct. App. 1991).
[25] *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence [that] might bear on the accuracy and truth of a witness' testimony....[26]

The Uniform Law Commission has recommended a rule recognizing bias as a form of impeachment. The bias rule proposed in the accompanying petition is adopted from Uniform Rules of Evidence 616, which codifies *United States v. Abel*. Minnesota also has adopted this bias rule.[27]

As the court of appeals noted in *State v. Long*, Wisconsin law is in accordance with the principle set forth in *Abel,* so the proposed bias rule codifies the common law in Wisconsin. [28] The Judicial Council views codification of a bias rule as useful to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Wis. Stat. § 904.01. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence.[29]

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[26] *Abel*, 469 U.S. at 52.
[27] Minn. R. Evid. 616, adopted Dec. 28, 1989, eff. Jan. 1, 1990.
[28] *State v. Long*, 2002 WI App 114, ¶ 18, 255 Wis. 2d 729, 647 N.W.2d 884 (Ct. App. 2002).
[29] *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely…The extent of the inquiry with respect to bias is a matter within the discretion of the trial court.").

CONCLUSION

Wisconsin's Rules of Evidence were adopted by this court, effective January 1, 1974.[30] Over the years since their adoption, some deficiencies and gaps in the rules have developed, many of which have been addressed by case law.

The changes proposed in the Judicial Council's petition reflect the outcome of its multi-year study of Wisconsin's Rules of Evidence. The goal is to bring Wisconsin's evidentiary rules more closely in line with case law and practice. The proposed amendments are designed to improve the quality of legal practice in this state and reduce the number of errors and appeals, increasing court efficiency and effectiveness.

Dated _____, 2016

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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[30] Sup. Ct. Order, 59 Wis. 2d R1 (1973).