

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
January 15, 2016

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Honorable Brian W. Blanchard, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Greg M. Weber.

MEMBERS EXCUSED: Devon M. Lee, Tracy K. Kuczenski, Honorable Jeffrey A. Wagner, Amy E. Wochos, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis, Wisconsin State Bar; Scott Kelly, Office of Sen. Wanggaard.

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

Chair Bertz called the meeting to order at 9:35 a.m.

**II. Approval of December 18, 2015 Minutes**

MOTION: Council member Myers moved, seconded by Council member Stertz, to approve the December 18, 2015 meeting minutes. Motion approved unanimously.

**III. Discussion and/or Action Regarding Bill Amending the Rules of Criminal Procedure (Pending Assembly Bill 90 and Senate Bill 82)**

Attorney Southwick reported that immediately following the previous meeting of the Judicial Council, she attended a very productive meeting with the Council's legislative members. Council member Wanggaard reported that the co-chairs of the judiciary committees met to discuss the concerns previously raised by prosecutors regarding specific sections of Assembly Bill 90 and Senate Bill 82. Earlier in the week, they responded to the Department of Justice (DOJ) seeking clarification on thirteen items raised by the prosecutors. Four of the items request that DOJ either reevaluate its position or propose another alternative. The co-chairs have requested that DOJ respond by Tuesday, January 19, 2016. After receipt of a response from DOJ, the co-chairs will again meet to decide how to proceed on the remaining issues. They will invite Attorney Southwick to attend the meeting on behalf of the Judicial Council.

Council member Ott added that the Legislature is nearing the end of its session. He stated that the Legislature has floor periods scheduled for two weeks in February and that might

be the end of the session. To pass this session, the bill will need to go to the floor in February. Council member Wanggaard felt that the bill is poised to do that.

Council member Wanggaard noted that the effective date is still an outstanding issue to be decided. He asked the Council for input. Attorney Southwick recalled that when the Judicial Council previously discussed an effective date, members suggested a delay of eight to twelve months to allow various organizations to schedule training and seminars on the changes. Members discussed opportunities for attorney and judicial education regarding the changes. Council member Fitzpatrick noted that the Criminal Law and Sentencing Institute for circuit court judges is usually held in May of each year and the Judicial Conference is in early November. Council member Blanchard added that the prosecutors and the public defenders also have annual conferences in November.

Council members discussed applicability of the proposed changes and considered whether the amendments should apply to cases pending on the effective date or cases commenced after the effective date. Council member Fitzpatrick suggested that if the Legislature can provide some clarity and direction, fewer motions and appeals would result. Council member Shriner recalled that federal amendments have used a provision that states that amendments apply to cases commenced on or after the effective date and to pending actions unless the court determines it would be unfair. Attorney Southwick recalled that the Wisconsin Supreme Court used similar language when it adopted the Wisconsin Rules of Evidence.

#### **IV. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence, Including Wis. Stats. §§ 885.16, 885.17, 885.205, 901.07, 906.01, 906.08, 906.09, and the Creation of a Bias Rule**

Prior to the meeting, Attorney Southwick circulated a draft petition and supporting memorandum urging the court to adopt the recommended rule amendments and the proposed bias rule. She continues to work on drafting the accompanying petition seeking the repeal of the Deadman's statutes and the privilege for deans and school psychologists (Wis. Stats. §§ 885.16, 885.17, and 885.205).

Attorney Southwick explained that this petition contains recommended amendments to rules that were all created by the supreme court, so the court's authority to act is clear. The petition to repeal raises the issue of the court's authority to repeal statutes adopted by the Legislature, and will require a closer look at the shared rule making authority between the Legislature and the court in Wisconsin.

The first section of the supporting memorandum explains the study and drafting process that the Council used to arrive at its recommendations. Attorney Southwick noted that the court is often quite interested in the petitioner's efforts to obtain feedback from the bench and bar regarding the proposed rule changes, so the memo also contains information regarding that process.

The Council discussed the reasons for each proposed amendment as set forth in the supporting memorandum. Attorney Southwick noted that the proposed amendment to s. 901.07,

the rule of completeness, moves Wisconsin's rule more closely toward common law. The committee discussed that while the recent trend has been to align Wisconsin's rules with the federal rules, this is an exception based on conforming the rule to Wisconsin case law. The federal rule, like Wisconsin's current rule, focuses on written statements. Common law and the proposed amendment also include oral statements. Council member Shriner explained that given case law confirming that the common law continues to exist for oral statements in Wisconsin, the rule's current focus on written statements is a trap for the unwary and inexperienced practitioner.

Members discussed the proposed amendments to s. 906.08, evidence of character and conduct of witness. Attorney Southwick explained that federal Rule 608 was amended in 2003 and the proposed amendment to the Wisconsin rule maintains consistency with the federal amendment. It also maintains internal consistency with the proposed bias rule.

Members discussed the proposed amendments to s. 906.09, impeachment by prior conviction. Council member Shriner explained some of the differences between the Wisconsin rule and its federal counterpart. The proposed amendments more closely reflect actual practice in Wisconsin, as well as Wisconsin appellate case law. The committee also discussed that the proposed amendment provides guidance on rehabilitation of the witness, as currently reflected in case law. The Council discussed expungement, which is addressed in the proposed Judicial Council Note. Attorney Southwick explained that the Evidence & Civil Procedure Committee discussed whether to use the term "expungement" or "expunction" in the Note. The committee's research concluded that "expungement" is the term generally used throughout Wisconsin statutes, so the committee recommended using the term "expungement."

Attorney Southwick explained the procedural history behind the recommended amendments to s. 906.09, noting that the Evidence & Civil Procedure Committee studied the rule several times over a two-year period. The committee also invited a number of guest speakers to attend committee meetings and offer comment on the proposed amendment. The committee sought feedback from the Council's Criminal Procedure Committee, as well.

The committee discussed the proposed bias rule. Council member Fitzpatrick expressed his support for the proposed rule because under current case law, bias is not a collateral issue and that point is frequently missed by attorneys. Adoption of this rule will help prevent a common mistake that he sees in practice. Attorney Southwick noted that many states have adopted a bias rule and many of them are based on the uniform rule, as the Council is proposing. When the Evidence & Civil Procedure Committee recommended repeal of the Deadman's statutes, some committee members suggested that it might leave a gap in the rules. Members agreed that the adoption of a bias rule would adequately fill any perceived gap in the rules. Council member Shriner noted that the proposed rule codifies common law. Council member Blanchard noted that this issue arises frequently so he supported codification.

The Council discussed potential arguments in support of the repeal of the Deadman's statutes, as well as the history of the statutes and the previous attempt to repeal it in the 1970's.

Members also discussed whether to file the first petition containing the amendments or whether to wait until the petition seeking repeal is complete and file them together.

ACTION: Members approved by consensus the draft petition and supporting memorandum for filing with the court. The petition recommending amendments will be held until the petition recommending repeals is ready for filing so that they can be submitted together. Council members Ott, Wanggaard and Weber abstained from taking a position. Attorney Southwick added that she will also seek feedback on the supporting memorandum from the Evidence & Civil Procedure Committee members at their meeting later in the day.

## **V. Committee Reports**

### **A. Appellate Procedure**

Committee chair Ptacek reported that the committee continues to discuss the venue provision in the draft bill to reorganize and codify procedural rules regarding prisoner litigation. After the Council approved the bill, the Department of Justice's representative on the Appellate Procedure Committee reported that DOJ will likely oppose the bill if it contains the approved venue provision. The draft contains a provision that codifies current case law. The reason stated for the opposition is that DOJ is currently trying to persuade the court of appeals in several pending cases to overrule current law regarding venue. The committee discussed the issue at its last meeting and elected to seek input from former committee members Meredith Ross and Matt Robles because they were very involved in the drafting process. The committee will discuss the written response from Attorneys Ross and Robles at today's meeting.

The committee is also discussing procedures to handle payment of prisoner debts from settlement funds recovered in prisoner litigation. The Department of Corrections has an internal policy so the committee is working to obtain a copy of that policy. The committee is also talking with the Department of Justice to determine how they handle the issue in settlement agreements.

Committee chair Ptacek reported that the committee has also been discussing size and number of briefs in multiparty cases, and reviewing a rule draft. When the committee approves a draft, members intend to circulate it for comment from appellate practitioners. The committee intends to incorporate any proposed amendments with the recommended amendments to Rule 809.15, the record on appeal.

### **B. Criminal Procedure**

The committee did not meet in January so there was no further report.

### **C. Evidence and Civil Procedure**

Committee chair Shriner reported that the committee will continue to discuss a draft of a class action rule based on the federal model.

**VI. Other Business**

**A. PPAC Liaison's Report**

There was no report.

**B. Council Attorney's Report**

Attorney Southwick had no further report. Council member Shriner inquired when the Council will begin working on its next budget request. Council member Moran reported that the court system will begin its early stages of planning in March. He and Attorney Southwick will meet to begin discussing the Judicial Council's budget.

**VII. Adjournment**

The Council adjourned by consensus at approximately 10:30 a.m.