

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
January 20, 2017

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, Sarah Walkenhorst Barber, Sherry D. Coley, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, R. Duane Harlow, Devon M. Lee, J. Denis Moran, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright.

MEMBERS EXCUSED: Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Cale Battles, Wisconsin State Bar; Erika Strebel, Wisconsin Law Journal.

I. Call to Order, and Roll Call

Chair Bertz called the meeting to order at 9:30 a.m. Attorney Southwick circulated the roll call sheet.

II. Approval of December 16, 2016 Minutes

MOTION: Council member Myers moved, seconded by Council member Stertz, to approve the December 16, 2016 meeting minutes as presented. Motion approved unanimously.

III. Discussion and/or Action Regarding Recommendation to Amend Wis. Stat. § 803.08, Class Actions

Prior to the meeting, Attorney Southwick circulated a draft petition and a recommendation from the Evidence & Civil Procedure Committee that current s. 803.08 should be repealed and replaced with a rule based on the federal class action statute. The committee arrived at its recommendation following a lengthy study of Rule 23 of the Federal Rules of Civil Procedure. The committee also studied the class action rules in all the other states, with a majority (over 40) of those rules based on the federal model.

Council member Shriner stated that when the Judicial Council proposed Wisconsin's Rules of Civil Procedure over forty years ago, a few provisions were omitted, including a class action rule. He noted that there might have been reasons for that at the time, but those reasons no longer exist. Today, class actions are generally viewed as a useful mechanism to efficiently address a large number of claims. Only Wisconsin and two other states retain the class action provision from the 1849 Field Code. Most other states have adopted some version of the federal rule.

Federal Rule 23 was originally adopted in 1938 and has been amended numerous times since its adoption. It provides a procedural framework for handling class actions and fills in the many gaps in the Field Code provision. Council member Shriner noted that because there are so many gaps and no procedural rules in current s. 803.08, Wisconsin courts often look to federal law, even though it does not apply. He noted there are tremendous advantages to adopting a rule modeled on federal Rule 23. First, it opens up a huge body of federal case law interpreting a rule that has been around for over seventy years. Second, it is not inconsistent with current Wisconsin law. Third, the rules should be the same in both state and federal court so that the outcome of a case is the same regardless of where it is litigated.

Council member Shriner noted that there is a provision in current s. 803.08 that should be retained, but was inadvertently omitted from the proposed draft. It prohibits class action suits against the state seeking tax refunds.

Council member Shriner explained that as part of Wisconsin's Consumer Act, the legislature adopted provisions for class actions in consumer cases (s. 426.110). Those provisions are based on an older version of Rule 23. The current recommendation would repeal the procedural rules in s. 426.110 and replace them with the procedural provisions in proposed s. 803.08 so that all class actions in state courts would be governed by the same set of procedural rules.

Although s. 426.110 is based on the federal model, Attorney Southwick noted that it has not been amended to keep pace with the amendments to federal Rule 23. For example, it does not contain the important amendments that were adopted in 2003. Attorney Southwick provided some examples of amendments to Rule 23 that are not contained in current s. 426.110.

Council member Shriner discussed the class certification process and the importance of the court's ruling regarding class certification, noting that current s. 803.08 provides the court with extremely limited guidance.

Council member Shriner clarified that proposed new s. 803.08 is based on current Rule 23 with very limited changes. The changes are meant to make the language consistent with Wisconsin drafting standards, and are not intended to make substantive changes. The committee has circulated the proposed draft extensively and received no negative feedback. He suggested that might be due to the fact that class actions are widely accepted as a useful tool today and it would benefit both the plaintiffs and the defendants to have clear procedural rules for conducting them.

Council member Fitzpatrick spoke in support of the proposal. He referenced a class action that he presided over in Rock County as an example of why procedural rules would benefit judges making certification decisions in class action litigation. He noted that it has been several decades since the Wisconsin Supreme Court has issued any guidance in this area. The appellate courts have tried to fill in some of the gaps in the law, but the appellate courts have not issued many opinions interpreting the very brief language in current s. 803.08. In his opinion, the current statute is virtually useless, so he looked to federal case law for guidance when he had to issue a certification decision. He supported adoption of the proposed new rule because it fills

in the gaps in current law, which will aid judges who are presiding over class action cases. In addition, it will help attorneys provide better guidance to their clients.

Council member Shriner explained that the proposed rules also reflect the federal procedure regarding appeals from certification orders, which are consistent with Wisconsin's rule permitting discretionary appellate review. Certification is often a highly contested issue and can be a deciding factor in the case so it is important for the court of appeals to be able to review those decisions. By adopting the proposed rule, Wisconsin appellate courts will be able to look to established federal case law to aid in making decisions regarding when to take up appeals of certification orders.

Council member Wanggaard asked whether the adoption of the proposed rule will mean that Wisconsin courts can utilize the large body of federal case law that has developed around Rule 23. Council member Shriner responded in the affirmative and explained that the federal cases will be persuasive authority in Wisconsin courts.

Council member Gleisner suggested that initially some plaintiff's lawyers may have been resistant to the idea of adopting the federal class action rule, but it appears that opinion has changed. He felt that both plaintiffs and defendants would benefit from having the large body of federal law to provide guidance in class action litigation.

MOTION: Council member Myers moved, seconded by Council member Coley, to accept the committee's recommendation to repeal and replace current s. 803.08 with a class action rule modeled on federal Rule 23. Motion approved with Council members Ott and Wanggaard abstaining. Attorney Southwick was directed to work with the Evidence & Civil Procedure Committee to draft a supreme court petition and supporting memorandum for review by the Council prior to filing it with the court.

IV. Committee Reports

A. Appellate Procedure

Attorney Southwick reported that Court of Appeals Chief Staff Attorney Jenny Andrews has agreed serve as interim committee chair following the retirement of Judge Ptacek.

The committee continues to review the proposed amendments to the rules of appellate procedure regarding the record on appeal and briefs in multiparty cases to respond to feedback from both the Judicial Council and other interested groups. The committee also continues to work on a proposed new rule regarding substitution and withdrawal of counsel at the appellate level.

B. Criminal Procedure

Committee chair Blanchard reported that the Criminal Procedure Committee did not meet in January. Next month, the committee expects to resume its discussion regarding discovery rules for criminal cases. The committee surveyed public defenders and prosecutors in an effort

to learn more about current discovery practices, including problems prosecutors may have obtaining information from law enforcement. The committee is currently working on a survey for the private practice defense bar.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee will work to advance the recommendation regarding class actions. Additionally, the committee is studying the amendment to federal Rule 37 regarding discovery sanctions for failure to preserve evidence. The committee will discuss whether Wisconsin's rule (s. 804.12) should be amended to reflect the federal changes.

The committee also continues to consider the court's concerns with supreme court petition 16-02. An order from the court was issued earlier in the day, so the committee will review it at the meeting. Attorney Southwick added that Professor Blinka is working on a memorandum to the Council and he anticipates completing it prior to the committee's February meeting. Committee chair Shriner reported that an attorney has filed a motion for reconsideration of the court's vote regarding petition 16-01 to repeal the Deadman's statute.

V. Other Business

A. PPAC Liaison's Report

Council member Moran reported that PPAC has not met. The next meeting is scheduled on February 21, 2017.

B. Council Attorney's Report

Attorney Southwick had no further report.

VI. Adjournment

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