

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
December 16, 2016

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Sarah Walkenhorst Barber, William C. Gleisner, Christian A. Gossett, R. Duane Harlow, Devon M. Lee, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Senator Van H. Wanggaard, Professor Steven Wright.

MEMBERS EXCUSED: Vice Chair Honorable Brian W. Blanchard, Sherry D. Coley, Honorable Michael R. Fitzpatrick, J. Denis Moran, Benjamin J. Pliskie, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Nancy Rottier, Director of State Court's office; Cale Battles, Wisconsin State Bar; Marisa Janssen, Winnebago County District Attorney's office.

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

Chair Bertz called the meeting to order at 9:40 a.m. Attorney Southwick circulated the roll call sheet.

**II. Approval of October 21, 2016 Minutes**

MOTION: Council member Ptacek moved, seconded by Council member Stertz, to approve the October 21, 2016 meeting minutes as presented. Motion approved unanimously.

**III. Discussion and/or Action Regarding Recommendation to Amend Wis. Stat. § (Rule) 809.107, Appeals in Proceedings Related to Termination of Parental Rights; Wis. Stat. § (Rule) 809.15, Record on Appeal, and Wis. Stat. (Rule) 809.19, Briefs and Appendix; Wis. Stat. § (Rule) 809.30, Appeals in s. 971.17 Proceedings and in Criminal, ch. 48, 51, 55, 938, and 980 Cases; Wis. Stat. § (Rule) 809.32, No Merit Reports; and Wis. Stat. § 885.42, When Available (videotape procedure)**

At the previous meeting, the Council asked Attorney Southwick to circulate the proposed amendments to obtain feedback from potentially interested groups. The Council received feedback from the State Bar Appellate Practice Section Board, the Wisconsin Court of Appeals, and the Legislative Reference Bureau (LRB). Prior to the meeting, Attorney Southwick circulated the comments and a draft petition containing some additional changes to the proposed amendments based on the feedback she received from the interested groups.

In Section 1 and 2 of the draft petition, members supported the court of appeals recommendation to change "and" to "or." Members also supported the court of appeals suggestion to delete "of an action or proceeding" in Section 3.

Members were not opposed to LRB's suggested use of "under" instead of "pursuant to" in Sections 3 and 13. They were also unopposed to LRB's suggested use of "may" instead of "must" in Section 18. These changes were suggested by LRB to conform the provisions to LRB's current statutory drafting standards.

Attorney Southwick explained that in Section 10, the court of appeals suggested alternate modifications to the proposed language to reflect the use of electronic records and the absence of the transfer of paper records. She proposed a slightly modified version of the suggestions from the court, and invited Council members to provide additional input. Council member Shriner suggested modifying it further to read, "A motion to supplement or correct the record shall be filed with the clerk of the circuit court until the record has been transmitted to the court of appeals; thereafter, the motion shall be filed with the clerk of the court of appeals. The movant shall send a copy of any motion that is filed in circuit court to the clerk of the court of appeals." Members agreed with that suggestion.

Attorney Southwick suggested that the title in Section 16 should be amended to delete the multiple uses of "and." Members agreed with this suggestion.

Attorney Southwick also noted that the State Bar's Appellate Practice Section had a few additional comments. With regard to s. 809.19(14) and s. 809.32(1), the Section expressed concern with the following: "Any use of the presentence investigation report shall identify any person named in the presentence investigation report by one or more initials or other appropriate pseudonym or designation." The Section felt that the proposed rule creates a new, free-standing rule of confidentiality beyond the victim protection rule (s. 809.86). Attorney Southwick explained that the prohibitions on the use of names found in proposed s. 809.19(14) and s. 809.32(1) are not derived from sec. 809.86. Instead, these proposed new rules take into consideration s. 809.19(1)(g), which requires reference to individuals by initials or pseudonyms when the record is required by law to be confidential. Under s. 972.15, the presentence investigation report is a confidential document.

The Appellate Practice Section also suggested adding a cross reference to s. 809.107 in s. 809.19(8m) to assist guardians ad litem in determining deadlines and requirements. Attorney Southwick had no recommendation, and asked Council members for comments on this proposal. Council member Lee supported the addition of the cross-reference. Attorney Southwick will seek input from the Appellate Procedure Committee regarding where to add the reference. She stated that it could be addressed by adding a cross-reference or by drafting a Judicial Council Note.

Council member Wanggaard inquired whether the addition of a cross-reference could cause issues in the future if one or both of these statutes are amended and the cross-reference is no longer accurate. Council member Barber responded that the LRB addresses those issues regularly, and the drafters have a process in place to check the accuracy of all cross-references so that it does not cause problems in the future.

The Appellate Practice Section noted that attorneys occasionally wish to supplement the record with something that was never presented or considered at the trial level, and suggested

that the amendment to s. 809.15 might cause confusion because the title references “supplements.” Attorney Southwick recalled that the committee also considered this issue, but was unable to draft a recommendation to address it. Council member Harlow stated that the appellate attorney’s view of the case often differs from the trial attorney. The appellate attorney may file a motion to supplement with evidence that should have been considered. He also noted that the title includes supplements, although the rule only addresses corrections. Attorney Southwick offered to find excerpts from the minutes regarding the committee’s previous discussions, as well as previous rule drafts that were considered and rejected by the committee, if the Council would like to consider it further. The Council referred this issue to the Appellate Procedure Committee for further consideration and a recommendation.

Attorney Southwick also noted that the Appellate Practice Section might be suggesting some new projects to the Council in the near future.

Attorney Southwick felt the petition was a little disjointed and questioned whether to include the proposed changes regarding briefing in multiparty appeals. She asked members to consider that when they review the draft rule change petition and suggested that perhaps those proposed amendments should be placed in a separate petition. Chair Bertz expressed his opinion that it would be easier for the court to consider the proposals as separate petitions.

#### **IV. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence, Supreme Court Petition 16-01 and 16-02**

Prior to the meeting, Attorney Southwick circulated a memo summarizing questions and concerns regarding petition 16-02 that were raised by the court at its administrative conference following the public hearing on the two petitions filed by the Judicial Council.

Council member Shriner reported that the court adopted the Council’s recommendation in petition 16-01 to repeal the Deadman’s statutes. Council member Shriner explained that with regard to petition 16-02, the court referred the petition back to the Council to provide some additional clarification and consider additional amendments. In particular, the court requested more information regarding the use of “character for truthfulness” and “credibility.” Professor Dan Blinka has offered to assist the Council with clarifying that issue for the court.

Council member Shriner noted that there seemed to be some confusion between the terms “character for truthfulness” and “credibility” when the court discussed the proposed amendment to Rule 906.08. He explained that credibility is a broader question that can encompass more than “truthfulness.” He noted that credibility can be called into doubt through evidence such as prior inconsistent statements, a criminal record, bias, and interest.

Council member Shriner noted that at least one justice stated a preference for including excerpts from the federal Advisory Committee Notes in the Judicial Council Notes that accompany amendments. Attorney Southwick noted the difficulty in doing that for some rules because the federal rules have been amended more frequently than Wisconsin’s rules. Wisconsin’s rules were based on the federal model at the time they were adopted, but the language in many of the rules has diverged over the years. Council member Gleisner suggested

that the Judicial Council Notes could include the year of the amendment and explain how the Wisconsin rule is similar or differs from the federal rule in effect during that year. Council member Shriner expressed opposition because the Judicial Council does not have the resources to keep pace with the federal Advisory Committee's work.

The Council discussed the proposed changes to Rule 901.07, often referred to as the rule of completeness. The court expressed concern about possible confusion arising from the proposed use of the phrase "recorded or unrecorded statement" and the proposed omission of the term "writing." The Council generally supported the change suggested at the hearing by Justice Kelly to read "when any part of a writing or statement, whether recorded or unrecorded..."

The Council discussed Rule 906.08(2), pertaining to impeachment. The proposed amendment would replace the term "credibility" with "character for truthfulness." The court asked the Judicial Council to provide more information about this change.

The Council discussed the proposed changes to Rule 906.09 pertaining to impeachment by prior conviction of a crime. Council member Shriner noted that Wisconsin's rule is quite different from the federal rule. He also noted that the proposed amendments are intended to align the rule with Wisconsin case law. Attorney Southwick stated that the Wisconsin District Attorneys Association submitted a letter in support of petition 16-02. The Council was very mindful of concerns previously expressed by prosecutors when it proposed amendments to s. 906.09.

Members discussed proposed Rule 906.16, bias. The court asked the Judicial Council to explain how the proposed rule compares with the Uniform Law, the decision to use the term "credibility" in this section, and whether extrinsic evidence should be referenced in the language of the rule. Attorney Southwick stated that the proposed rule is the same as the Uniform Law.

The Council discussed whether there will be another public hearing when it submits an amended petition. Council member Shriner expressed his desire that the Council have an opportunity to fully address the concerns of the court. Attorney Southwick will prepare a supplemental supporting memorandum to accompany the amended petition.

Council member Shriner stated that the court did not consider the Council's recommendation to repeal Wis. Stat. § 885.205 regarding privilege for deans of students and school psychologists. The court determined that it did not have the authority to repeal the provision because it was a substantive rule. Attorney Southwick noted that she has met with Council member Ott to discuss introducing a bill in the Legislature to repeal s. 885.205.

## **V. Committee Reports**

### **A. Appellate Procedure**

Committee chair Ptacek reported that the committee continues to discuss withdrawal and substitution of counsel at the appellate level. The committee will continue to review a draft rule proposed by Chief Staff Attorney Jenny Andrews, Court of Appeals.

Attorney Southwick reported that the draft bill regarding procedural challenges to agency decisions is ready for introduction. She has met with Council member Ott to discuss introduction of the draft bill.

Council member Ptacek noted that it was his last meeting with the Judicial Council due to his upcoming retirement. Ad hoc committee member Jenny Andrews agreed to serve as interim chair of the Appellate Procedure Committee.

Council members expressed their appreciation for the wonderful work that Council member Ptacek has done during his years on the Council and his years as chair of the committee.

## **B. Criminal Procedure**

Attorney Southwick reported that the Criminal Procedure Committee continues to discuss the scope of the problems that were reported regarding the current discovery rules for criminal cases. The committee previously obtained information from public defenders around the state. Most recently, the committee surveyed 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.

The committee is currently looking at ways to improve the discovery process without amending the statutes. Members are considering steps such as additional training conducted by the Department of Justice, issuing model best practices, and drafting checklists to aid law enforcement and prosecutors in confirming that all discoverable information has been produced.

Attorney Southwick noted that there has been a tremendous turnover in the district attorneys' offices around the state. The Department of Justice recently held a training class for newly elected district attorneys and there were about 25 in attendance. With so many district attorneys new to their office, the committee suggested that this might be a very good time to offer training and recommendations to improve the discovery process.

Council member Shriner inquired whether there are specific law enforcement agencies that are not providing complete case information to prosecutors. Council member Gossett stated that it appears the smaller agencies are having more difficulty. He suggested that it could be because they do not have the resources or a person assigned to oversee it. Agencies are also struggling with storage and production of digital evidence, including video from body cameras.

Attorney Southwick noted that the recent survey indicated that most district attorneys assign someone in their office to handle the production of discovery. That person is generally not an attorney, and discovery is often produced without an attorney reviewing it. The survey responses also indicate that many offices do not have a way to track what has been produced. It also appears that many law enforcement agencies may not have a reliable process to track the information that has been provided to the prosecutor. Council member Gossett also reported that redaction is a problem. Prosecutors do not have the resources to review hours of video to

determine whether it contains information that should be protected and they do not have the technology to redact it.

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

Committee chair Shriner reported that today's meeting will be rescheduled due to the winter storm that is expected. The committee will meet next week to begin work on addressing the court's concerns with petition 16-02.

The committee is nearing completion of its work on a draft class action statute modeled on the federal class action rule (Rule 23). Chair Shriner also noted that Rule 37 of the Federal Rules of Civil Procedure, on which Wisconsin's safe harbor provision is modeled, has recently been amended with regard to electronically stored information. The committee is studying the amendment and considering whether Wisconsin's rule should be amended to reflect the federal changes.

## **VI. Other Business**

### **A. PPAC Liaison's Report**

Nancy Rottier reported that PPAC has not met.

### **B. Council Attorney's Report**

Attorney Southwick reported that she will continue to work with Council member Ott on the introduction of the bill to repeal s. 885.205 and the bill regarding prisoner litigation. She thanked Council member Ptacek for his years of service on the Judicial Council and the fantastic work he has done as chair of the Appellate Procedure Committee. She wished him well in his retirement.

## **VII. Adjournment**

The Council adjourned by consensus at approximately 11:00 a.m.