

STATE OF WISCONSIN
SUPREME COURT

In re:

No. 13-16
PROPOSED AMENDMENT TO
WISCONSIN STATUTE § 887.24.

**MEMORANDUM IN SUPPORT OF
AMENDED PETITION OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING
WIS. STAT. § 887.24**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 24, 2015

INTRODUCTION

On November 15, 2013, the Wisconsin Judicial Council filed a rule petition (No. 13-16) requesting that the court repeal Wis. Stat. § 887.24 and replace it with the Uniform Interstate Depositions and Discovery Act (UIDDA), as amended to comport with Wisconsin law.

The court conducted a public hearing on the proposed rule on September 29, 2014. At its open administrative rules conference on December 5, 2014, the court discussed various aspects of the proposed rule. Ultimately, the court voted to return the petition to the Judicial Council for editing and refinements reflecting the court's discussions, as set forth in the court's non-final order, filed March 12, 2015.

The Judicial Council's Evidence & Civil Procedure Committee carefully reviewed each of the issues raised by the court and issued a recommendation to the full Judicial Council. The recommendations were accepted by the full Council at its meeting on March 20, 2015. This memorandum explains the changes made to the proposed rule by the Judicial Council, as set forth in the accompanying amended petition, in response to each of the court's discussions.

DISCUSSION

1. Whether to include federally recognized Indian tribes.

At the December 5, 2014 administrative conference, a majority of the court supported excluding federally recognized Indian tribes from the rule, so the amended petition removes “a federally recognized Indian tribe” from the definition of “State” in sub. (1) of the proposed rule. The reference to federally recognized Indian tribes was also deleted from the accompanying Judicial Council Committee Note.

2. Whether proposed Wis. Stat. § 887.24(3)(c), permitting issuance of a subpoena by a Wisconsin attorney, should specify that the subpoena must contain all the elements applicable to a subpoena issued by a clerk of circuit court.

The Judicial Council revised sub. (3)(c), Issuance by an attorney, to add the following sentence: “The subpoena must comply with par. (a)(1)-(5).” Paragraph (a)(1)-(5) contains all the elements applicable to a subpoena issued by a clerk of circuit court.

3. Whether the proposed language regarding whether issuance of a subpoena constitutes a court appearance is clear, as drafted.

The Judicial Council revised sub. (3)(d) as follows: “Requesting issuance of ~~Obtaining and completing~~ a subpoena under this subsection does not constitute an appearance in the courts of this state.” The revised language also tracks more closely with the original language of the UIDDA.

4. Whether a clerk may maintain any record of subpoenas.

In response to this concern, the Judicial Council revised sub. (4) to add that the clerk, “should not create a case file, but the clerk may keep a record of the subpoenas

issued.” The Judicial Council Committee Note was also revised to specify that the prohibition on creating a file applies to a “case” file.

5. Whether the duties imposed on clerks of court are ministerial and what it means for a clerk to "verify" the terms of a foreign subpoena.

The Judicial Council believes that the duties of the clerks of court in the proposed rule are ministerial because the clerk merely confirms that the Wisconsin subpoena is facially compliant with the requirements in sub. (3)(a). The term “verify” was deleted from the Judicial Council Committee Note and the example set forth in the Note was modified to state clearly that “ ‘issue’ means confirm that the subpoena, on its face, complies with s. 887.24(3)(a) and sign it.”

6. Whether to include a reference to statutes as well as rules in proposed Wis. Stat. § 887.24(5).

The Judicial Council revised sub. (5) to include “rules and statutes relating to discovery...”

7. Procedures for imposing fees and expenses.

Proposed sub. (6) permits the court, in its discretion, to award any prevailing party its reasonable attorney fees and expenses. In response to questions from the court regarding the procedure, the Judicial Council Committee Note to sub. (6) now states, “This is consistent with motions to compel and for protective orders in discovery disputes under ss. 804.12(1)(c) and 804.01(3)(b).” With this addition, the Judicial Council intends to clarify that the procedures will be the same as those used to resolve discovery disputes under current Wisconsin law.

8. Whether a subpoena should be filed where discovery will occur or where the witness resides.

The Judicial Council determined that both requirements are important: The subpoena should be issued in the county where the discovery will occur and discovery should occur in the county where the witness resides. Sub. (3)(a) now clearly states, “a party must submit the foreign subpoena to the clerk for the county in which discovery is sought...” Further, sub. (3)(a)(1) requires the requester to list the Wisconsin county in which discovery is to be conducted as the court from which the subpoena is issued.

Sub. (3)(a)(1) also specifies that discovery is to be conducted in the county in which the witness resides. If the witness is not a natural person, discovery is to be conducted in a county in which the witness does substantial business. The rule now requires that the subpoena must also list the address, including county of residence, for the witness. This final provision was added to make it simple for the clerk of court to quickly determine whether the subpoena is facially compliant with the rule.

9. Whether adoption of the proposed rule would require amendments to Wisconsin Form GR-126 (Subpoena and Certificate of Appearance).

The Judicial Council Committee Note to sub. (3) includes the following directive: “If there is insufficient space on the subpoena form, the subpoena can be supplemented with additional material.” This language is consistent with the information that is provided at the bottom of the current subpoena form, which reads: “This form shall not be modified. It may be supplemented with additional material.” Because the current subpoena form can be supplemented, the Judicial Council does not believe the form requires modification.

CONCLUSION

The Judicial Council urges the court to adopt the UIDDA, with modifications to accommodate Wisconsin practice, as set forth in the amended petition accompanying this memorandum. The proposed rule is simple and efficient, it requires minimal judicial oversight, it is cost effective, and it is fair to deponents.

Dated March 24, 2015.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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