

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 19, 2010

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

MEMBERS PRESENT: Chair Marla J. Stephens, Vice-Chair Beth E. Hanan, James C. Boll, Honorable Ann Walsh Bradley, Professor Jay Grenig, Representative Gary Hebl, Catherine A. La Fleur, Honorable Edward E. Leineweber, Honorable Gerald P. Ptacek, Robin L. Ryan, Professor David E. Schultz, Rebecca St. John, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Thomas W. Bertz, Michael R. Christopher, Honorable Patricia S. Curley, Allan M. Foeckler, Senator Lena Taylor.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Kate Battiato, Office of Representative Hebl; Eric Peterson, Erica Lopez, and Christopher Gibbs from the Office of Senator Lena Taylor.

I. Call to Order and Roll Call

Chair Stephens called the meeting to order at 9:45 a.m., and announced that she will be stepping down as chair effective immediately. She turned the meeting over to Vice-Chair Hanan, who will assume the position of chair for the remainder of the council year.

II. Approval of January 15, 2010 Minutes

MOTION: Council member Hebl moved, seconded by Council member Stephens, to approve the minutes with two minor amendments: 1) change “Appellate Practice” to “Appellate Procedure” on page three, and 2) change “filing” to “filings” on page four. Motion approved unanimously.

III. Discussion and/or Action Regarding Wisconsin Rules of Evidence

A. Bias Rule

Attorney Southwick stated that when the Council voted in support of eliminating the Deadman’s statute, it was suggested that a bias rule could be introduced to recognize the public policy behind the initial adoption of the Deadman’s statute.

The Evidence and Civil Procedure Committee has spent several months discussing a bias rule, and reviewing rules adopted by other states, as well as the federal uniform rule. The committee focused on whether the adoption of Federal Uniform Rule 616 would cause unintended consequences regarding the application of current Wisconsin case law addressing bias.

Minnesota is among the states that have adopted Federal Uniform Rule 616. The committee specifically looked at the use of extrinsic evidence under the bias rule in Minnesota, because Minnesota's treatment of extrinsic evidence is substantially the same as in Wisconsin courts. Based on the committee's study of Minnesota law, it does not appear that the adoption of Rule 616 will change the treatment or use of extrinsic evidence in Wisconsin. Attorney Southwick added that the Judicial Council note accompanying the proposed bias rule is also adopted from the note accompanying Minnesota's rule, modified to incorporate Wisconsin case law regarding extrinsic evidence.

Chair Hanan asked whether the committee considered incorporating a specific reference to extrinsic evidence in the body of the rule, as opposed to the note. Attorney Southwick stated that the committee considered a proposed amended version of Rule 616 which specifically references extrinsic evidence; however, that amendment was never adopted by the federal uniform rules committee. Council member La Fleur added that the current version of Rule 616 has been adopted by several other states, so there is an existing body of case law available, and that would not be the case if Wisconsin adopted a modified version. Council member White inquired as to the effect the adoption of a bias rule will have on other evidentiary rules. Attorney Southwick stated that there should be no changes because the proposed rule simply codifies current Wisconsin law.

Council member Ptacek questioned the use of the term "practice" in the second sentence of the note accompanying the proposed rule. He suggested that the note should specifically state that the rule does not change current case law. Council member Stephens explained that a reference to "practice" was used in notes accompanying amendments to the rules of appellate procedure, so there is precedent for the use of that term in Judicial Council notes.

MOTION: Council member Stephens moved, seconded by Council member Wagner, to adopt the recommendation of the Evidence & Civil Procedure Committee as contained in Attorney Southwick's February 12, 2010 memorandum to the Council.

Council member Schultz agreed with the concerns expressed by Council member Ptacek, and proposed that the note clarify that the adoption of the rule is meant to codify Wisconsin law. Council member Stephens accepted a friendly amendment to her motion to adopt the recommendation with an amendment to the second sentence of the note to reflect that adoption of the rule is meant to codify Wisconsin common law. After further discussion, Council member Stephens withdrew her motion. Council member Leineweber spoke in support of the proposed amendment to the second sentence of the note.

Council member Schultz moved adoption of the proposed bias rule as drafted, with a change in the second sentence of the Judicial Council note to state that the rule codifies the common law in Wisconsin, instead of stating that it does not change current practice. Motion approved unanimously, with Council member Bradley abstaining from the discussion and vote.

IV. Committee Reports

A. Appellate Procedure

Committee chair Stephens reported that at today's Appellate Procedure Committee meeting, the committee anticipates finalizing its recommendation concerning amendments to the statutes regarding presentence investigations. She expects that the proposal will be ready for review by the full Council prior to the March meeting.

B. Criminal Procedure

Committee chair Schultz reported that the work group (Schultz, St. John and Stephens) met on January 29 and February 12. They are responding to Legislative Reference Bureau notes and questions regarding the proposed criminal procedure bills, and have completed their review of chapters 967, 968 and 969. The work group will meet again on February 25 and March 11, and they hope to finish their review of the remaining chapters prior to the next Council meeting.

C. Evidence and Civil Procedure

Attorney Southwick reported that on January 21, 2010 the supreme court held a public hearing on Judicial Council rule change petition 09-01 (discovery of electronically stored information). The Court asked the Council to file an amended petition incorporating language more closely mirroring three of the federal discovery rules, as well as to reconsider a rule regarding discovery conferences. The drafting group has prepared an amended petition, and it will be reviewed later today by the Evidence & Civil Procedure Committee. Attorney Southwick expects the amended petition to come to the full Council for review at the March meeting. The court requested that an amended petition be filed in two or three months, and at this time it appears the Council will be able to comply with that timeline.

Chair Hanan inquired as to whether any council members have received comments on the petition. No one reported receiving any new comments. Council member La Fleur asked whether the State Bar offered comments. Attorney Southwick reported that a letter was filed with the court stating that the State Bar Board of Governors supports the petition, but would recommend adding provisions regarding cost shifting and claw back. The individuals who spoke at the public hearing offered similar comments. With regard to claw backs, the Evidence and Civil Procedure Committee has recommended that claw backs should be addressed in connection with an evidentiary rule similar to Federal Rule 502. The committee included Rule 502 in the rules of evidence work plan previously approved by the Council.

At its meeting later today, the committee will continue to discuss the "other acts" rule. Guest speaker Assistant Attorney General Greg Weber will attend the meeting to provide a prosecutor's perspective on the rule.

V. Other Business

A. PPAC Liaison's Report

Council member Voelker reported the following items to be discussed at the next PPAC meeting: 1) a petition to update facilities security guidelines, and 2) a project involving pro se

litigants and the unbundling of legal services. Chair Hanan requested that he keep the Council apprised of the project involving the unbundling of legal services because it could be relevant to the Appellate Procedure Committee's new project regarding ghostwriting of legal documents.

B. Assembly Judiciary Committee Report

Council member Hebl stated that the committee is currently working on several issues, including: 1) a bill to allow electronic filing of criminal complaints by police officers to the District Attorney's office; 2) amendments to limit the Governor's veto power; and 3) a bill to adopt the federal uniform power of attorney so that a Wisconsin power of attorney is enforceable across state lines.

C. Senate Judiciary Committee Report

There was no Senate Judiciary Committee report.

D. Council Attorney's Report

Attorney Southwick reported that rule change petition 09-12 (confidential mediation communications) has been set for a supreme court public hearing on April 27, 2010 at 2:00 p.m., and she invited council members to participate at the hearing. Judge Haase, the individual who brought this issue to the Council's attention, is also planning to appear in support of the petition.

VI. Adjournment

Chair Hanan announced that the Evidence & Civil Procedure Committee will meet in the Judicial Council office at 11:30 a.m., and the Appellate Procedure Committee will meet in Room 328NW at 11:30 a.m. The Criminal Procedure Committee has several meetings set over the next few weeks. The next Judicial Council meeting is March 19, 2010.

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