

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
March 18, 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, Sarah Walkenhorst Barber, Christian A. Gossett, Devon M. Lee, J. Denis Moran, Dennis Myers, Representative Jim Ott, Honorable Gerald P. Ptacek, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Professor Steven Wright, Greg M. Weber.

MEMBERS EXCUSED: Honorable Michael R. Fitzpatrick, William C. Gleisner, Benjamin J. Pliskie, Amy E. Wochos, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis, Wisconsin State Bar; Katelyn Ferral, Cap Times; Marisa Janssen, Winnebago County District Attorney's office.

I. Call to Order, and Roll Call

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

II. Approval of February 19, 2016 Minutes

MOTION: Council member Wagner moved, seconded by Council member Shriner, to approve the February 19, 2016 meeting minutes as presented. Council member Ptacek noted a correction to reflect that he was excused from attendance at that meeting. Minutes approved unanimously as corrected.

III. 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 revised supporting memorandum urging repeal of the Deadman's statutes and the privilege for deans and school psychologists (Wis. Stats. §§ 885.16, 885.17, and 885.205). She noted that since the previous meeting, she has been working with the Evidence & Civil Procedure Committee on the revised memorandum, and feels it is now ready for submission to the court.

The Council discussed the memorandum section by section. Attorney Southwick noted that states began repealing or limiting their Deadman's statutes about a century ago. Today, about thirty-seven states have repealed their Deadman's statutes. Of those that remain, many are limited in their application. Wisconsin has one of the strongest of the remaining Deadman's statutes.

The Wisconsin Deadman's statutes have met with disfavor for many decades. The Judicial Council recommended its repeal when it proposed adoption of Wisconsin's Rules of Evidence in the early 1970's. At that time, the court repealed many other provisions in Chapter 885, including other competency statutes, but the court's order is silent regarding why it did not repeal the Deadman's statutes. Attorney Southwick did some historical research on the Council's petition and found that repeal of the Deadman's statutes was opposed by the probate section of the State Bar. The probate section later went on to draft proposed legislation amending the Deadman's statute, but it does not appear to have found any traction with the Legislature. It does not appear that the Legislature has taken any action in this area.

The courts have limited the Deadman's statute by imposing very strict requirements for invoking it. Because those strict requirements are not found in the text of the statute, it can be difficult to understand and use correctly.

The Council discussed Wis. Stat. s. 885.205 and the arguments supporting its repeal, including the inconsistent drafting within the text of the statute and the confusing provisions. It has only been referenced in one appellate case, and the court noted that it was incorrectly applied. The Evidence & Civil Procedure Committee sought feedback from a number of school groups. No group objected to its repeal. Two groups specifically support repeal of the statute because it is confusing.

Council member Weber reported that the Department of Justice has not objected to the repeal of the Deadman's statutes, but it requested that the Council delay action on the petition for one more month to allow DOJ to consult with the University of Wisconsin regarding the proposed repeal of s. 885.205.

The Council discussed the court's authority to repeal these provisions. Council member Shriner noted that s. 751.12 grants the court authority because these provisions are procedural, not substantive law.

Members discussed the proposed bias rule. Evidence of bias of a witness is admissible under current case law, so the Council has recommended codification of the rule. Council member Shriner suggested that a bias rule can be used to fulfill the public policy behind the Deadman's statutes.

Attorney Southwick noted that a great effort was made to solicit feedback on the proposed amendments. Last spring, she sent the proposed amendments directly to a number of potentially interested groups, along with a request for their comments. Also, the State Bar published the proposed amendments in at least one of its generally distributed publications with a notice to its readers regarding when and where to submit their comments. No one responded in opposition to the proposed changes.

ACTION: Motion by Council member Weber to postpone action for one month, seconded by Council member Shriner. Motion approved unanimously.

IV. Discussion and/or Action Regarding Wis. Stat. § 885.03, Service of Subpoena

Prior to the meeting, Attorney Southwick distributed a brief memo explaining that the Council previously accepted a project to study whether s. 885.03 and other provisions regarding service satisfy due process notice requirements. The project was referred to the Evidence & Civil Procedure Committee. Over the past several years, the committee has been working on several other large projects, including the rules of evidence and the class action statutes, so it has been unable to commence work on s. 885.03. Attorney Southwick inquired whether the entire Council would like to work on the project, noting that rules regarding service affect almost all practitioners and judges.

Council member Shriner explained that service of process to commence a lawsuit has a three-tiered approach to service. The preference is personal service. Substitute service is only permitted if personal service has been diligently attempted, but was unsuccessful. If a summons is left at the home, it must be left with an adult or a family member over the age of 14. The final method is publication, but it is not favored and diligent attempts at other forms of service must have been made. Unlike a summons, s. 885.03 permits a subpoena to simply be left at the abode of the recipient. There is no requirement that it must be left with an adult or a family member. Council member Shriner suggested that this type of service may not be sufficient to satisfy the requirements of due process. He noted that the language from the summons provision (Wis. Stat. § 801.11) has been used in other statutes regarding service. He suggested that the same language could be used in s. 885.03.

Historically, the Council has elected to work on some study projects instead of referring them to a standing committee for study and a recommendation. Attorney Southwick suggested that if the Council elects to work on this project, the first step should be to define the scope of the study (i.e. study s. 885.03 only or include other statutes that address service). Council member Shriner noted that many of the notice provisions apply to parties who are already involved in a proceeding, so service is generally up to the lawyer. He suggested that those provisions are sufficient. He felt that the Council should focus on studying notice provisions that apply to parties who are not involved in the proceeding, including both criminal and civil.

Vice Chair Blanchard inquired whether Attorney Southwick has conducted any research regarding rules in other jurisdiction. She responded in the negative. Council member Shriner stated that the federal rule require personal service of a subpoena. It does not provide for substituted service. Council member Van De Hey stated that in his county, family law and small claims actions require personal service before a party can be found in contempt.

Members asked Attorney Southwick to conduct some additional research including procedures by which Wisconsin courts acquire initial jurisdiction over a person, and service requirements in other jurisdictions. Members also asked Attorney Southwick to draft a proposed amendment to s. 885.03 that would make it consistent with the procedures required to serve a summons.

Council member Shriner suggested a draft could eliminate substitute service of a subpoena. Vice Chair Blanchard suggested that could present a problem in criminal cases where

there is a high volume of subpoenas served. Council member Gossett expressed concern with that change because some witnesses deliberately avoid service of subpoenas in criminal cases.

Attorney Southwick will place this item on the next agenda so that the Council can continue to consider it.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee did not meet last month, but at today's meeting, members will continue to discuss size and number of briefs in multiparty cases. The committee has nearly completed a proposed draft rule and intends to circulate it for comment once it has been approved by the committee. The committee intends to incorporate the proposed amendments to Rule 809.19 with its recommended amendments to Rule 809.15, the record on appeal, that it have already been drafted.

Committee chair Ptacek reported on the committee's efforts to follow up on questions previously raised by the Council regarding settlement funds in prisoner litigation cases and the payment of prisoners' debts. He reported that the committee reviewed a policy from the Department of Corrections (noting that the policy is currently being modified) that provides for certain percentages of a prisoner's trust fund to be allocated toward debt repayment. The Department of Justice also includes provisions in settlement agreements to allocate how the money will be disbursed to address debt repayment. The committee concluded that if the prisoner is still incarcerated at the time of settlement, there are already sufficient policies to address debt repayment. If the prisoner has been released, the prisoner is in the same position as any other litigant. If the prisoner's attorney is aware that the prisoner has unpaid debts, the attorney may wish to disburse the funds as quickly as possible to avoid collection actions against the attorney's trust account.

At today's meeting, the committee will begin discussing two new projects, including withdrawal or substitution of counsel at the appellate level and trials in bifurcated cases when one issue is still on appeal.

B. Criminal Procedure

Committee chair Blanchard reported that the committee met to consider whether amendments to the criminal procedure discovery rules should be recommended through a supreme court rule change petition. The committee asked Attorney Southwick to conduct some additional research to determine whether other jurisdictions have recently amended their discovery rules and the process that was used for the amendment (legislative vs. supreme court action). The committee will continue studying the issue at its next meeting. Attorney Southwick reported that her preliminary research indicates that four or five states have recently amended their rules or are in the process of amending discovery rules through supreme court action.

Council member Wanggaard stated that he and Council member Ott are going to work with stakeholders over the summer to have the amended criminal procedure bill ready for reintroduction in January. They will also work on a bill to amend the competency provisions. The legislative members were supportive of advancing amendments to discovery rules through the supreme court.

Attorney Southwick reported that she has been updating the redlined version of the bill to reflect the changes in the most recent amended version of the bill. She intends to have it completed prior to the next meeting of the Criminal Procedure Committee. She will also forward a copy to the legislative members.

The Council's legislative members stressed the importance of keeping stakeholders updated on the content of the bill, as well as keeping an open dialogue with interested stakeholders to make sure their concerns are addressed prior to reintroduction of the bill. Council member Gossett reported that he intends to keep the district attorneys updated through regular email communications.

C. Evidence and Civil Procedure

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

VI. Other Business

A. PPAC Liaison's Report

Council member Moran reported that the supreme court has approved adoption of a mandatory e-filing rule. He anticipates that it will be rolled out county-by-county, beginning in July. It will include electronic signatures and it will be implemented for all case types, beginning with small claims and civil cases.

B. Council Attorney's Report

Attorney Southwick reported that delayed payments to vendors and for travel reimbursement continue under the new STAR system implemented by the Department of Administration.

VII. Adjournment

The Council adjourned by consensus at approximately 10:45 a.m.