

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL  
MADISON, WISCONSIN  
April 15, 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, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, J. Denis Moran, Benjamin J. Pliskie, Representative Jim Ott, Honorable Gerald P. Ptacek, Chuck Stertz, Honorable Robert P. Van De Hey, Honorable Jeffrey A. Wagner, Senator Van H. Wanggaard, Amy E. Wochos, Greg M. Weber.

**MEMBERS EXCUSED:** Vice Chair Honorable Brian W. Blanchard, Devon M. Lee, Dennis Myers, Thomas L. Shriner, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

**OTHERS PRESENT:** April M. Southwick, Judicial Council Attorney; 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 9:35 a.m.

**II. Approval of March 18, 2016 Minutes**

**MOTION:** Council member Wagner moved, seconded by Council member Wochos, to approve the March 18, 2016 meeting minutes as presented. Motion approved unanimously.

**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).

At the previous meeting, Council member Weber requested that the Council delay action on the petition for one month to allow the Department of Justice (DOJ) to consult with the University of Wisconsin regarding the proposed repeal of s. 885.205. He reported that DOJ reached out to some of its client agencies and received no comments, concerns, or objections regarding the proposed repeal.

**ACTION:** Motion by Council member Gleisner, seconded by Council member Wochos, to approve filing the petition. Motion approved unanimously. Attorney Southwick will file it within the next few business days, along with the petition and supporting memorandum previously approved by the Council and containing proposed amendments to evidence rules.

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

Prior to the meeting, Attorney Southwick distributed a research memorandum and a draft of a possible amendment to s. 885.03. The research memo contained many examples of rules from other jurisdictions regarding service of subpoenas. Attorney Southwick noted that in other jurisdictions, such rules are found in the rules of civil procedure, evidence, or criminal procedure, depending on the state. She also noted that in addition to Wisconsin, she only found one other state that permits service by simply leaving the subpoena at the witness's home.

Council member Gossett observed that many other states allow service by certified mail, which is not one of the permitted methods in Wisconsin. He expressed concern that service by mail could take much longer than service under the current Wisconsin rule, and could be a 15-20 day process. He also expressed concern that service by mail is subject to the witness accepting the certified mail. In his experience, witnesses in the criminal justice system often attempt to avoid service. He felt that service by mail could result in delays and an increased cost for service. Chair Bertz inquired about the current process, asking what happens when a subpoena is simply left at the home of a witness with no personal service and the person fails to appear. Council member Gossett responded that he would probably request a material witness warrant.

Attorney Southwick asked the judicial members whether they have observed delays because a subpoena was left at a home and the witness claims to have never received it. Council member Fitzpatrick indicated that he can see the potential for problems under the current statute, but he does not often experience it in his courtroom. Council member Ptacek suggested that it can present a problem because the precedent for issuing a material witness warrant may be unclear (for example, whether an affidavit of service must be filed). What is sufficient service?

Council member Gossett suggested that district attorneys have to address problems related to service much more frequently than judges because prosecutors have to serve or attempt to serve witnesses in almost all cases, even though only a few of those cases ultimately result in a trial or hearing. Council member Van De Hey suggested that it is an increasing problem for the courts, especially in domestic abuse cases where witnesses often try to avoid testifying. Council member Gossett agreed and stated that in his experience, service by leaving a subpoena at a house is a last resort. There is a lot of time and money invested in preparing a case for trial and the prosecution needs witnesses to be present, so prosecutors generally work diligently to insure that the witnesses have actual notice and will attend. Council member Fitzpatrick inquired who serves the subpoenas. Council member Gossett stated that in his county, they primarily use their in-house investigators. Council member Fitzpatrick stated that in his county, he has seen problems with service by commercial process service companies (for example, one attempt at service is considered "reasonable diligence").

Council member Wochos suggested that the Council should consider alternative methods of providing notice that take into account advances in technology. She expressed her opinion that traditional service by publication in a newspaper is archaic and it seldom provides actual notice to the intended recipient. Council member Pliskie agreed.

Council member Wagner inquired where this project originated. Attorney Southwick explained that it was brought to the Council by the Evidence & Civil Procedure Committee. When the committee was drafting a proposed rule based on the Uniform Interstate Deposition and Discovery Act, the committee reviewed the service rules. When the committee reviewed the rule regarding service of subpoenas, they questioned whether simply leaving a subpoena at the home of a witness is sufficient notice to satisfy due process requirements. The committee also noted that it is inconsistent with almost every other Wisconsin statute regarding service because most require that notice be left with a specific person such as an adult residing in the same home or a family member.

ACTION: Motion by Council member Moran, seconded by Council member Stertz, to approve study of the issue by the Council as a whole instead of referring it to a committee. Motion approved with Council member Gossett opposed.

Attorney Southwick inquired as to what additional information the Council would like to review. She suggested a comparison of alternate methods of service used in other jurisdictions. The Council was particularly interested in alternate forms of service that use technology. The Council also requested additional information regarding who may serve, when must the witness be served, where may it be served, how is personal jurisdiction obtained, and what constitutes reasonable diligence.

Council member Gossett noted that many witnesses simply agree to accept service by mail or other method, even though it is not listed as an alternative method of service in the statute. If the witness does not appear, they cannot be held in contempt under current law because service was not done in a manner set forth in the statute. He inquired whether any other jurisdictions have a provision addressing voluntary acceptance of service by a method not specifically contained in the service statute.

Attorney Southwick will compile some additional information for the Council to study at its next meeting.

## **V. Committee Reports**

### **A. Appellate Procedure**

Committee chair Ptacek reported that the committee has nearly completed a proposed draft rule regarding the record on appeal, and the size and number of briefs in multiparty cases. The committee has also incorporated its proposed amendments to address presentence investigation material in the record on appeal. The committee intends to circulate the draft for comment once it has been approved by the committee, and he anticipated approval at today's meeting.

At today's meeting, the committee will continue 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. Attorney Southwick has compiled research on current Wisconsin law and sample rules from other jurisdictions regarding withdrawal of counsel. The committee has

sought feedback from the State Bar litigation section board regarding continuing to trial when a bifurcated issue in the case is on appeal.

**B. Criminal Procedure**

In Committee chair Blanchard's absence, Attorney Southwick reported that the committee met and continues to discuss whether possible amendments to the criminal procedure discovery rules should be studied, and whether proposed amendments should be recommended through legislation or a supreme court rule change petition. Attorney Southwick conducted some preliminary 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 considering the issue at its next meeting.

**C. Evidence and Civil Procedure**

Attorney Southwick reported that the committee did not meet in March, but the committee continues to work on a proposed amendment to the class action statute based on the federal model. Members will resume their work in May.

**VI. Other Business**

**A. PPAC Liaison's Report**

Council member Moran reported that PPAC will soon begin working on the court's budget request.

**B. Council Attorney's Report**

Attorney Southwick and Council member Moran met to discuss the Judicial Council's budget request. She will meet with the Council's Executive Committee to prepare a draft budget request for presentation to the Council at the June meeting.

Attorney Southwick congratulated Council member Van De Hey on being named 2015 Judge of the Year.

**VII. Adjournment**

The Council adjourned by consensus at approximately 10:20 a.m.