

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
December 18, 2015

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, Honorable Michael R. Fitzpatrick, 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, Senator Van H. Wanggaard, Greg M. Weber, Amy E. Wochos, Professor Steven Wright, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: William C. Gleisner, Tracy K. Kuczenski, Benjamin J. Pliskie, Honorable Jeffrey A. Wagner.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Michael Queensland, Legislative Council; Adam Plotkin, Office of the State Public Defender.

I. Call to Order, and Roll Call

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

II. Approval of November 20, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Wanggaard, to approve the November 20, 2015 meeting minutes. Motion approved unanimously.

III. Discussion and/or Action Regarding Bill Amending the Rules of Criminal Procedure (Pending Assembly Bill 90 and Senate Bill 82)

Vice Chair Blanchard explained that at its December 8, 2015 meeting, the Criminal Procedure Committee finished discussing each item contained in the document titled "Issues/Potential Changes Summary" prepared by the Department of Justice (DOJ) and the Wisconsin District Attorneys Association (WDAA). Draft minutes from the committee meeting were circulated to Council members. Vice Chair Blanchard reported that the committee believes that some issues raised in the summary from the prosecutors appear to be the result of confusion or misunderstanding. Some issues raise good points that might lead to amendments to the bill. Other issues in the summary raise policy decisions that the committee felt were best for the Legislature to decide.

Council member Ott noted that there is agreement with regard to most of the issues raised in the summary, and he expressed optimism that those issues could easily be dealt with in an amendment to the bill. Several stakeholders will be meeting with Council members Ott and Wanggaard later in the day to discuss the remaining issues. Council member Wanggaard would

like the issues resolved today so that the bill is ready to move forward in January. He noted that the Judiciary Committees are planning to remove the amendments to chapter 975, Competency, from the bill and address them in separate legislation.

Attorney Southwick asked the judges on the Council to review the proposed amendments in the summary from the prosecutors that directly affect court proceedings, and let her know if they have any concerns with the proposed changes.

IV. Discussion and/or Action Regarding Proposed Amendments to the Wisconsin Rules of Evidence

Prior to the meeting, Attorney Southwick circulated a memorandum dated December 11, 2015, containing a recommendation from the Evidence & Civil Procedure Committee regarding how to move forward with the proposed amendments to the Wisconsin Rules of Evidence.

Attorney Southwick provided a brief summary of the project's history. She noted that Wisconsin's evidentiary rules are based on the federal rules and were adopted by the supreme court in the early 1970's. However, there are still some evidentiary rules contained in other chapters of the Wisconsin statutes that predate the adoption of Wisconsin's Rules of Evidence. Most of the Council's recommended amendments are to the rules adopted by the supreme court, but there are two recommended repeals of older statutory provisions that were adopted by the Legislature. The committee recommended that all of the proposed amendments should be presented to the supreme court to act on in the form of two rule change petitions. The recommended statutory repeals should be contained in a separate petition since their repeal presents different issues than the amendments proposed in the other provisions. If the court determines that the statutory repeals should be left to the Legislature, the court can deny that petition without delaying the other recommended amendments.

Council member Shriner clarified that the committee believes the court has authority to repeal the statutes under its rule making authority granted by Wis. Stat. § 751.12. However, the supreme court previously declined to repeal the Deadman's statutes when it originally adopted Wisconsin's Rules of Evidence over forty years ago. The committee's recommendation is an acknowledgement that the repeal of the Deadman's statutes presents some unique issues, and the court could decline to act on it again.

Attorney Southwick explained that no legal reason was cited in the court's 1973 order to explain why it declined to repeal the Deadman's statutes previously, although the legal community appears to view the statutes differently today than it did forty years ago. The Judicial Council's proposed repeal of the Deadman's statutes faced a great deal of opposition in 1972, including from the State Bar. When the Council sought feedback on the current recommendation to repeal it, there was no opposition in 2015. Council member Shriner added that during the last forty years, the appellate courts have expressed hostility toward the Deadman's statutes and have limited its use through case law.

MOTION: Council member Shriner moved, seconded by Council member Myers, to adopt the recommendation from the Evidence & Civil Procedure Committee. Motion approved with Council members Ott, Wanggaard and Ziegler abstaining.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that following the last Council meeting at which the Council approved the committee's draft bill to reorganize and codify procedural rules regarding prisoner litigation, the Department of Justice's representative on the Appellate Procedure Committee reported that DOJ will likely oppose the bill if it contains the approved venue provision. The reason stated is that DOJ is currently trying to persuade the court of appeals to overrule current case law regarding venue. The proposed bill contains a codification of current case law. Attorney Southwick explained that the Council could proceed with the bill as drafted, remove the proposed venue provision and propose an amendment after the court of appeals rules on the pending cases, or hold the bill pending resolution of the cases. Committee chair Ptacek stated that the DOJ representative on the committee will provide a status update on the three pending cases at the committee's meeting following the Council meeting, and he will update the Council at next month's meeting.

Committee chair Ptacek reported that the proposed rules drafted by the clerk of the court of appeals and supreme court amending Rule 809.15 to address issues related to electronic records have been adopted by the supreme court. The committee will resume work on its proposed amendments to the same rule. Council members discussed issues relating to electronic records and filing.

Committee chair Ptacek reported that the committee has also been discussing size and number of briefs in multiparty cases, and reviewing rules from other jurisdictions.

At the previous meeting, the committee considered whether there should be a procedure to handle payment of prisoner debts from settlement funds recovered in prisoner litigation. The committee asked for additional information from Council member Shriner regarding how private practitioners are currently handling prisoner settlement funds. Council member Shriner offered to provide the committee with the names of some attorneys who have dealt with the issue recently.

B. Criminal Procedure

There was no further report. Attorney Southwick noted that if there is no further development regarding the criminal procedure bill, the committee will probably cancel its January meeting.

C. Evidence and Civil Procedure

Committee chair Shriner reported that the committee continues to study possible amendments to Wisconsin's class action statute (Wis. Stat. § 803.08) to bring it more in line with the federal class action rule (Rule 23). The committee has completed its review and discussion of the federal rule, and it is ready to begin drafting a proposed new Wisconsin rule.

The committee will also consider a proposed new project on expert witnesses and discovery of communication between lawyers and experts (Wis. Stat. § 804.01) based on recent amendments to the federal rule. The committee will discuss the proposed project and decide whether to recommend it to the full Council for consideration.

Council member Fitzpatrick reported that Prof. Blinka recently suggested to him that the Judicial Council should also review the non-substantive amendments to the federal Rules of Evidence to determine whether they should be incorporated into the Wisconsin rules. Committee chair Shriner suggested that perhaps the Criminal Procedure Committee could assist with the review. Members generally agreed that any non-substantive amendments should be considered as an independent project to avoid delaying the current proposed amendments to Wisconsin's Rules of Evidence. No action was taken.

VI. Other Business

A. PPAC Liaison's Report

There was no report.

B. Council Attorney's Report

Attorney Southwick had no further report

VII. Adjournment

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