

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 19, 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, Honorable Michael R. Fitzpatrick, William C. Gleisner, Christian A. Gossett, Devon M. Lee, J. Denis Moran, Dennis Myers, Benjamin J. Pliskie, Thomas L. Shriner, Chuck Stertz, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Amy E. Wochos, Professor Steven Wright, Greg M. Weber.

MEMBERS EXCUSED: Representative Jim Ott, Honorable Gerald P. Ptacek, Honorable Jeffrey A. Wagner, Honorable Annette Kingsland Ziegler.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Lynne Davis and Cale Battles, Wisconsin State Bar; Scott Kelly, Office of Sen. Wanggaard; Erika Strebel, Wisconsin Law Journal; Karla Keckhaver and Mike Austin, Department of Justice; Adam Plotkin, State Public Defender's office; Marisa Janssen, Winnebago County District Attorney's office; Nancy Rottier, Director of State Court's office.

I. Call to Order, and Roll Call

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

II. Approval of January 15, 2016 Minutes

MOTION: Council member Stertz moved, seconded by Council member Myers, to approve the January 15, 2016 meeting minutes as presented. Motion approved unanimously.

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

The chairs of the Senate and Assembly Judiciary Committees drafted an amendment to AB 90/SB 82 in response to concerns from prosecutors, but it stalled in committee. Since the Assembly has concluded its work for the year, there is insufficient time for stakeholders to review the amendment and for the Legislature to act on the bill. Attorney Southwick noted that it was apparent that stakeholders had not had sufficient time to review the amendments because the written opposition from the Department of Justice complained about provisions that had been completely removed from the bill by the amendment. Council member Wanggaard added that he received phone calls from district attorneys who were unaware that the bill had been amended.

Now that the amendments are completed, the Council discussed that there is time for stakeholders to review the amended bill and remove their objections prior to reintroduction in the next legislative session. Scott Kelly, Council member Wanggaard's office, reported that the amended bill addresses all the concerns raised by victims' rights groups and law enforcement. It

also makes almost all of the changes requested by prosecutors. Council member Wanggaard reported that he will continue to work on the competency provisions that were removed from the bill. He intends to have legislation ready for introduction in January.

Attorney Southwick reported that the proposed amendments to the discovery provisions were also removed from the bill. She noted that several stakeholders previously suggested that the bill is too large and should be broken up into smaller sections. She suggested that since the discovery provisions have been removed, perhaps they should be advanced separately as a supreme court rule change petition. Stakeholder opinions seem to vary widely regarding discovery procedures, with some groups complaining that the proposed amendments do not make enough changes to update the rules, and other groups complaining that the amendments make too many changes. Because discovery is procedural, perhaps the court would be the appropriate body to make the determination. She recommended that the Council refer it to the Criminal Procedure Committee for further study and a recommendation. Council member Blanchard spoke in support of that recommendation, noting that discovery is a very contentious area. Council member Gossett supported breaking up the bill into smaller sections to make it more manageable for interested parties to review and discuss.

Council member Shriner noted that a lot of work has gone into the bill in the past two years and stakeholders are finally engaged. He expressed his hope that the Legislature will keep the momentum going and reintroduce the bill in January. He asked what the Council can do to keep the process moving forward. Council member Wanggaard suggested that the Council could assist in identifying and involving stakeholders to work on competency and discovery. He also noted that interested stakeholders cannot procrastinate and wait until the final weeks of the legislative session to offer proposed amendments. They need to review the amended bill now and offer feedback so that the amendments can be drafted and vetted by January. Attorney Southwick offered to prepare a red-lined version of the amended bill to aid interested groups in understanding how it will change current law if it is enacted.

The Council discussed various ways to move forward with the bill. Council member Fitzpatrick expressed concern that perhaps some of the stakeholders are opposed simply because they object to change, and no amount of work or amendments to the bill will convince them to remove their objection. Attorney Southwick stated that recently she has been reviewing the historical records from two other comprehensive code amendments drafted by the Council (the rules of evidence and the rules of civil procedure). She found it interesting that both of those amendments faced strong opposition to the changes, with arguments similar to those that have been made in opposition to the criminal procedure amendments. With regard to previous code amendments, the Council persevered in the face of opposition. The amendments were adopted, and the sky did not fall. She expressed hope that the same will be true of the criminal procedure amendments. Council member Shriner noted that the rules of evidence and the rules of civil procedure were based on the federal models, so it was easier to gain support for their adoption. The criminal procedure amendments are not based on another model.

The Council recognized and appreciated the hard work done by Council member Wanggaard and his staff, as well as the years of work by Professor David Schultz from the University of Wisconsin Law School.

ACTION: Council member Shriner moved, seconded by Council member Gossett, to refer amendments to the discovery provisions to the Criminal Procedure Committee for further study and a recommendation regarding whether they should be proposed via a supreme court rule change petition. Motion approved unanimously.

IV. 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 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).

Council member Shriner provided historical background regarding the rules of evidence project. He noted that the Council has already reviewed and approved the petition to amend ss. 901.07, 906.08 and 906.09 and create a bias rule. The recommendations to repeal ss. 885.16, 885.17 and 885.205 were placed in a separate petition because they seek repeal of provisions originally adopted by the Legislature. The Evidence & Civil Procedure Committee feels that because ss. 885.16, 885.17 and 885.205 are evidence rules, they should be acted upon by the court as part of the comprehensive update. The committee determined that the court has the authority to repeal these provisions, noting that the court previously repealed many provisions in chapter 885 when it originally adopted Wisconsin's Rules of Evidence. However, the committee recognizes that the court may defer to the Legislature to act on the recommended repeals, so it are being filed as a separate petition so as not to delay or affect the court's action on the remaining amendments.

Attorney Southwick suggested that the Council delay filing of the petition to allow her to seek feedback on the supporting memorandum from the Evidence & Civil Procedure Committee members at their meeting later in the day. Council members also were encouraged to provide their comments and suggestions to Attorney Southwick.

V. Discussion and/or Action Regarding Potential New Project Involving Wis. Stat. § 804.01(2)(d), Trial preparation: Experts

This project was proposed by Council member Gleisner to the Evidence & Civil Procedure Committee. Council member Shriner reported that the committee agrees that it is an appropriate project for further study and consideration by the Council. Prior to the meeting, Attorney Southwick circulated a memorandum from Council member Gleisner in support of the Council accepting the proposed project.

Council member Gleisner noted that the supreme court has previously indicated its support for keeping Wisconsin's procedural rules in line with the federal rules. Wisconsin's procedural rules often lack a body of case law interpreting the rules, while the federal rules often have extensive case law interpreting the rule and providing guidance on how it should be applied. He suggested that by modeling Wisconsin's rules on the federal rules, the courts and the

parties can use federal law to aid in interpreting and applying the rules. He proposed that the committee study a possible amendment of s. 804.01(2)(d) because current Wisconsin law allows discovery of communications between trial counsel and expert witnesses. He expressed his opinion that the current rule leads to inefficiencies and increased litigation costs because trial counsel has to retain experts as consultants. Amending Wisconsin's rule to bring it more in line with its federal counterpart could result in increased efficiency and decreased litigation costs, so he proposed that the Council undertake it as a project so that the Evidence & Civil Procedure Committee can study the issue and make a recommendation.

Council member Shriner spoke in support of accepting the project for further study, although he noted that the committee has several assigned projects that are still pending, so it may be some time before the committee is able to begin work on the project.

ACTION: Council member Blanchard moved, seconded by Council member Myers, to accept s. 804.01(2)(d) as a new project and refer it to the Evidence & Civil Procedure Committee for further study and a recommendation. Motion approved unanimously.

VI. Discussion and/or Action Regarding Procedural Rules for Prisoner Challenges to Agency Decisions

Prior to the meeting, Attorney Southwick circulated a recommendation from the Appellate Procedure Committee to make a slight revision to the bill draft that was previously approved by the Council. The provision in question codifies current case law. The proposed change was at the request of the Department of Justice because DOJ currently has three pending appellate cases in which they are seeking to modify current case law. Attorney Southwick noted that the change to the bill may become a moot point. The bill will probably not be introduced in the Legislature until January 2017, and the appellate courts may have resolved the issue by that time.

Council members discussed current case law, the proposed venue provision, and the venue issues in the pending appellate cases. In *State v. Ramey*, 121 Wis. 2d, 359 N.W.2d 402 (Ct. App. 1984), the court held that a claim of ineffective assistance of counsel at revocation must be raised as a state habeas petition in the county of custody. Assistant Attorney General Karla Keckhaver explained that DOJ is seeking to modify the holding in *Ramey* by asserting that there is another adequate and available remedy. The prisoner can bring a claim of ineffective assistance of counsel at revocation as a motion to reopen to the Division of Hearings and Appeals in Dane County. She stated that challenges to revocation under claims of newly discovered evidence are currently brought to the Division of Hearings and Appeals under *State ex rel. Booker v. Schwarz*, 2004 WI App 50. She felt that the venue provision, as contained in the draft bill, does not codify the holding in *Booker*, so she suggested it could be confusing for prisoners claiming newly discovered evidence.

Council member Shriner suggested that the Council does not need to wait for a court ruling on the venue issue. If case law should be clarified or changed, the change can be incorporated into the bill for adoption by the Legislature.

ACTION: Council member Moran moved, seconded by Council member Stertz, to accept the recommendation from the Appellate Procedure Committee. Following further discussion, the motion was withdrawn. Council member Shriner moved, seconded by Council member Lee, to table this item. Motion approved unanimously. Attorney Southwick stated that she will put it back on the Council's agenda when a decision is issued in any of the relevant appellate cases.

VII. Committee Reports

A. Appellate Procedure

In Committee chair Ptacek's absence, Attorney Southwick reported that the committee continues to discuss size and number of briefs in multiparty cases, and has reviewed several rule drafts. When the committee approves a final draft, members intend to circulate it for comment from appellate practitioners. The committee intends to incorporate any proposed amendments with the recommended amendments to Rule 809.15, the record on appeal, that it have already been drafted.

B. Criminal Procedure

The committee did not meet in February, so there was no further report.

C. Evidence and Civil Procedure

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

VIII. Other Business

A. PPAC Liaison's Report

There was no report.

B. Council Attorney's Report

Attorney Southwick reported on problems the Judicial Council has been experiencing because of the implementation of the STAR project at the Department of Administration, including significantly delayed payments to vendors and for travel reimbursement, and an error in payroll. Council member Weber stated that DOJ has also been experiencing the same type of problems related to the new system.

IX. Adjournment

The Council adjourned by consensus at approximately 11:10 a.m.