

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
March 16, 2012

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

MEMBERS PRESENT: Chair Thomas W. Bertz, Vice Chair Rebecca R. St. John, Christine Rew Barden, Honorable Brian W. Blanchard, William Gleisner, Catherine A. La Fleur, Honorable Mark Mangerson, Honorable Gerald P. Ptacek, Brad Schimel, Professor David E. Schultz, Thomas L. Shriner, Marla J. Stephens, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Allan M. Foeckler, Cathlene Hanaman, Representative Jim Ott, Senator Rich Zipperer.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney, Sandy Lonergan, Wisconsin State Bar.

I. Call to Order, Roll Call and Introductions

Chair Bertz called the meeting to order at 9:35 a.m and introduced new member Judge Brian Blanchard.

II. Approval of February 17, 2012 Minutes

MOTION: Council member Shriner moved, seconded by Council member Gleisner, to approve the February 17, 2012 meeting minutes as submitted. Motion approved unanimously.

III. Discussion/Action Regarding Proposed Amendments to the Rules of Criminal Procedure

Council member Schultz reported that he is in the process of reviewing the draft and preparing responses to the notes from the Legislative Reference Bureau (LRB) drafting attorneys. He is also reviewing comments and questions from individual attorneys at the Department of Justice (DOJ). The LRB notes raise relatively minor issues and the questions and comments from DOJ attorneys have been helpful. Council member Schultz will share his responses and observations with the Criminal Procedure Subcommittee, and report to the Council at the April meeting for final approval of the draft bill.

Attorney Southwick reported that she has talked with the drafting attorney at the LRB and she believes they will have a bill analysis completed this summer. The LRB will then put a note on the bill requesting a fiscal estimate. There should be plenty of time for the Department of Administration to complete the fiscal estimate by fall. Once the Council receives the analysis and fiscal estimate, it will be easier to talk with more legislators regarding support for the bill. The Council is on schedule to have the bill ready for introduction in January, as suggested by Council member Ott.

IV. Discussion and/or Action Regarding Recommendations from the Appellate Procedure Committee Regarding Presentence Investigation Reports

Attorney Southwick reported that the LRB finished the revisions to the draft bill regarding presentence investigation (PSI) reports. Council member Stephens recommended that the PSI bill should be advanced along with the criminal procedure bill. She suggested contacting current and former legislative Council members regarding their support for the bill.

Members discussed whether to roll the PSI bill into the criminal procedure bill or leave them as two separate bills and advance them together. Council member Schultz stated that the criminal procedure bill makes some changes to the sentencing chapter so the two bills address the same general subject area, if the Council prefers to consolidate them.

Council member Shriner noted that the two bills may have support or interest from different groups. Council member Stephens added that both drafting projects involved compromise by the two different committees that worked on them, so it may not be a good idea to combine the bills. The Council agreed by consensus that although the bills are complimentary, but it would be best to advance them as two separate pieces of legislation.

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

Marquette University Law School Professor Dan Blinka previously recommended that the Judicial Council undertake a comprehensive review of the Wisconsin Rules of Evidence. The Council adopted a work plan containing a list of rules to be reviewed. The Evidence & Civil Procedure Committee has been studying the identified rules and preparing recommendations for discussion and consideration by the full Council. Once the work plan is completed, Attorney Southwick will compile all the recommended rule amendments so that they can be presented to interested groups and parties for feedback. Most of the recommended amendments can be accomplished through a supreme court rule change petition, although some amendments will likely require legislation.

A. "Character for Truthfulness," Wis. Stat. § 906.08

Attorney Southwick previously provided members with a memo containing a recommendation from the Evidence & Civil Procedure Committee regarding Wis. Stat. § 906.08. Professor Blinka initially suggests a general clean up s. 906.08, which governs evidence of a witness's character for truthfulness. He participated in a committee meeting, and further suggested reviewing the federal advisory committee's notes from the 2003 amendment to Rule 608 of the Federal Rules of Evidence.

The committee ultimately recommended amending s. 906.08 (2) to substitute "witness's character for truthfulness" in place of "witness's credibility," consistent with the federal amendment to Rule 608. Additionally, the committee recommends an explanatory note to clarify that no inference should be derived from the fact that the committee proposed an amendment to the term "credibility" in s. 906.08 (2) but did not recommend the same amendment in ss. 906.09

and 906.10. This note is also consistent with the Rule 608 amendment. Council member Shriner stated that the committee has generally attempted to adhere to the changes made to the federal rules so that courts and practitioners can take advantage of developed federal case law.

Council member White stated that the recommended amendment refines and clarifies s. 906.08. It is consistent with how the judiciary applies the rule in practice without interfering with attacks on credibility based on prior inconsistent statements and other rules.

MOTION: Council member Schultz moved, seconded by Council member Wagner, to approve the committee's recommendation as submitted. Motion approved unanimously.

B. "Impeachment by Prior Conviction," Wis. Stat. § 906.09

Attorney Southwick previously provided members with a recommendation from the Evidence & Civil Procedure Committee regarding Wis. Stat. § 906.09, impeachment by prior conviction. A number of special guests with expertise in the area of criminal law were invited to participate in committee meetings and provide input regarding this rule. After many months of study and discussion, the committee recommended codification of the factors for a circuit court to consider in evaluating whether to admit evidence of prior convictions for impeachment purposes.

The proposed amendment codifies the Wisconsin Supreme Court's holding in *State v. Gary M.B.*, 2004 WI 33, that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors. The committee was particularly persuaded by Chief Justice Abrahamson's reasoning that "[t]he purposes of requiring a circuit court to perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system."

Council member Shriner noted that s. 906.09 is an example of a Wisconsin evidentiary rule that differs significantly from the federal model. There was no significant support for a proposal to bring the Wisconsin rule in line with Federal Rule of Evidence 609.

Council member St. John asked whether it is advisable to create a rule requiring the consideration of certain factors, or whether the determination regarding exclusion should be left to the discretion of circuit court judges. Council member White stated that she prefers to have factors clearly established because it provides concrete guidance for both the court and the parties.

Council member Mangerson questioned whether the recommendation could be interpreted to mean that the enumerated factors are the only factors to consider. He suggested that the proposal should be amended to state "include, but are not limited to..."

Council member Schimel questioned whether consideration of the enumerated factors should be required. He suggested that the rule should use the term "may." Attorney Southwick

explained that the committee discussed this issue at length and was ultimately opposed to making it discretionary. The committee determined, for the reasons cited in *Gary M.B.*, that consideration of the factors should be mandatory and incorporated in the record.

Council member Schultz noted that under s. 906.09, two questions are permitted for the witness: 1) Have you been convicted of a crime? and 2) How many times? That language is not in the rule and it can be only be found in case law. Did the committee consider amending the rule to reflect case law? Additionally, there is a debate regarding whether the defendant can introduce evidence to rehabilitate himself. Did the committee consider specifically addressing that issue in the rule? Attorney Southwick noted that the committee avoided recommendations regarding sub. (1) of the rule because it is established by case law, yet it is a very unique rule. Council member Shriner noted that the committee was not in complete support of the concept that asking only those two questions provides sufficient information for a fact finder to conclude that the witness is less credible, so the committee was not anxious to codify it. Council member Stephens stated that the case law is well settled. The Council's goal should be to make it easy for a practitioner to find the law by incorporating it in the rule. She suggested that the committee reconsider amending sub. (1) to reflect case law. Members noted that the case law is referenced in the Judicial Council Note to the rule, but agreed that the rule could be more clear.

Council member St. John asked whether the committee discussed the impact that the proposed amendment to sub. (2) could have on a harmless error/independent review analysis on appeal. Attorney Southwick stated that the committee considered that issue, studied a number of relevant cases and generally agreed that the amendment would not preclude a harmless error analysis.

Council member La Fleur stated that in her experience, civil practitioners generally avoid using s. 906.09. She stated that the proposed amendment is helpful because it provides guidance for conducting an analysis to determine the appropriate case in which to use the evidence.

Members discussed the last sentence in sub. (1), which states, "The party cross-examining the witness is not concluded by the witness's answer." Members generally agreed that the sentence is confusing and perhaps it could be drafted for greater clarity.

MOTION: Council member Wagner moved, seconded by Council member Shriner, to refer the issue back to the Evidence & Civil Procedure Committee for further study and a recommendation regarding sub. (1). Motion approved unanimously.

C. "Definitions: Hearsay," Wis. Stat. § 908.01

Attorney Southwick previously provided members with a recommendation from the Evidence & Civil Procedure Committee regarding Wis. Stat. § 908.01, definition of hearsay. Wisconsin's current rule mirrors the federal rule. Professor Blinka suggested that the committee consider defining "truth of the matter asserted," as a few other states have done. The committee studied the matter and concluded that the change was likely to cause confusion. The committee was also reluctant to move away from federal law. The committee recommended no amendment to the current rule.

MOTION: Council member Stephens moved, seconded by Council member Wagner, to approve the committee's recommendation as submitted. Motion approved unanimously.

VI. Discussion and/or Action Regarding Potential Future Projects

A. Wis. Stat. § 803.08, Class Action Statute

Council member Shriner explained that an article in the *Wisconsin Lawyer* publication suggested the need to amend s. 803.08, and suggested that Wisconsin should consider adopting the federal rule. Council member Shriner explained that when Wisconsin adopted its current rules of civil procedure based on the federal model, there were several federal rules that Wisconsin did not adopt, including s. 803.08. Instead, Wisconsin kept the class action rule that had been in place since the 1800's. Council member Shriner suggested that the rule should be referred to the Evidence & Civil Procedure Committee for further study and a recommendation.

Council member Shriner added that there may be a much larger project in the committee's future regarding the rules of civil procedure. He and Dean Kearney have had Marquette University Law School students conducting research for the past several years. They have compiled a lot of information regarding civil procedure rules that should be considered for amendment. In the near future, Council member Shriner will recommend that the Council accept it as a new project for the Evidence & Civil Procedure Committee.

MOTION: Council member Shriner moved, seconded by Council member White, to refer Wis. Stat. § 803.08 to the Evidence & Civil Procedure Committee for study and a recommendation. Motion approved unanimously.

Council member Schimel asked about the process used by the Council to select new projects. He asked whether committees are allowed to initiate new projects. Attorney Southwick explained that all projects must first be discussed and accepted by the full Council. Committees or individual members are certainly welcome to propose new projects for the Council's consideration. Council member Schimel stated that there has been a great concern raised by the child advocacy community due to the recent release of a video of a child detailing alleged abuse in an interview with an investigator. He suggested that perhaps there should be a change in the law with regard to the release of that type of information. Attorney Southwick invited Council member Schimel to send her a memo explaining the issue and proposing a change. She will then place it on a future agenda for discussion by the full Council. Council member Stephens suggested that it would be very helpful to also have a solid understanding of the current law that may be applicable.

VII. Committee Reports

A. Appellate Procedure

Committee Chair Stephens reported that the Appellate Procedure Committee met last month and continued to discuss protecting victim identity in documents that are publically

available via the internet. She noted that it is difficult to fashion a remedy at the appellate stage when no effort has been made to protect the victim's identity during the prosecution. At this time, the committee is focused on drafting a proposal to prevent a Google search of the victim's name from returning results containing an appellate brief or decision. Members discussed options for protecting the victim's identity, including use of initials only, first name and last initial, and pseudonyms. Council member Schimel spoke in favor of using pseudonyms. Council member Ptacek stated that CCAP is utilizing optical character recognition software to redact confidential information. He suggested that the committee include a CCAP representative in the discussion of protecting victim identity.

At today's meeting, the Council's research assistant will also present the first phase of her research regarding how other jurisdictions address the precedential value of overruled decisions.

B. Criminal Procedure

Committee Chair Schultz had no further report.

C. Evidence and Civil Procedure

Committee Chair Shriner reported that the Evidence & Civil Procedure Committee did not meet last month but the committee is scheduled to meet today. Committee member Judge Leineweber prepared a draft proposal to codify the holding in *Alt v. Cline*, 224 Wis.2d 72, which basically created a privilege permitting experts to refuse to testify in certain circumstances. The committee expects to begin its review and discussion of the proposal at today's meeting.

VII. Other Business

A. PPAC Liaison's Report

Council member Wagner reported that PPAC continues to discuss outcome-based sentencing and the National Center for State Courts Effective Justice Strategies Research Project.

Council member St. John asked about the status of the limited scope representation project. Attorney Southwick stated that the last update she received was that PPAC was appointing a drafting subcommittee to propose rules to implement the recommendations.

B. Council Attorney's Report

Attorney Southwick reported that she has been negotiating a renewal of the lease for the Council's office space. She believes they have reached an agreement that will result in a significant cost-savings for the Council on a new two-year lease.

Attorney Southwick reported that the Council still has one vacancy as a result of Michael Christopher's resignation and one member is continuing to serve an expired term. The vacant position is a citizen appointment that must be made by the Governor. The expired term is also a

citizen appointment or reappointment that must be made by the Governor. She is aware that there have been a number of applications submitted to the Governor's office by individuals interested in filling the positions, and she encouraged anyone with contacts in the Governor's office to reach out and encourage appointments to fill the two remaining positions.

VIII. Adjournment

The Council adjourned by consensus at 11:20 a.m.