

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
September 18, 2009

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

MEMBERS PRESENT: Chair Marla J. Stephens, Vice-Chair Beth E. Hanan, Thomas W. Bertz, James C. Boll, Michael R. Christopher, Representative Gary Hebl, Catherine A. La Fleur, Kathleen A. Pakes, Robin Ryan, Professor David E. Schultz, A. John Voelker, Honorable Mary K. Wagner, Honorable Maxine A. White.

MEMBERS EXCUSED: Honorable Ann Walsh Bradley, Honorable Patricia S. Curley, Honorable George S. Curry, Allan M. Foeckler, Professor Jay Grenig, Honorable Edward E. Leineweber, Senator Lena Taylor, Greg M. Weber.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Eric Peterson, Chief of Staff for Senator Taylor; Kate Battiato, Office of Representative Hebl, Honorable Robert Haase, Reserve Judge.

I. Call to Order and Roll Call

Chair Stephens called the meeting to order at 9:40 a.m.

II. Approval of June 19, 2009 Minutes

The minutes were approved by consensus with no amendments.

III. Discussion and/or Action Regarding Wisc. Stat. § 904.085 (4) (e), Communications in Mediation

Reserve Judge Robert Haase appeared as a guest speaker. Judge Haase requested that the Judicial Council prepare a rule change petition to the supreme court to amend Wisc. Stat. § 904.085 (4) (e). Under the current rule, a hearing regarding the confidentiality of evidence admissible during mediation is not required to be conducted in camera. Judge Haase has proposed an amendment to require an in camera hearing to protect potentially confidential information from being revealed in open court prior to a ruling on its admissibility. Judge Haase clarified that this provision is applicable to the admissibility of evidence in a different action than that which was mediated.

MOTION: Council member Wagner moved, seconded by Council member Hebl, to support this request by having Attorney Southwick draft a rule change petition to the Supreme Court on behalf of the Council.

Robin Ryan inquired as to who identified this gap in the rules. Judge Haase explained that it came to light during a review of the rules by the State Bar ADR committee. Judge Haase further

explained that even with the proposed amendment, the court's ruling would still be part of the record. The motion was approved unanimously.

IV. Discussion and/or Action Regarding Parliamentary Rules and Procedures for Conducting Meetings

Chair Stephens stated that this item was on the agenda at the request of Council member Weber. Due to his absence, she adjourned it until the next meeting.

VI. Discussion of Wisconsin Rules of Evidence

Attorney Southwick reminded the Council that under the previously approved work plan, the Evidence and Civil Procedure Committee was tasked with conducting a preliminary review and discussion of the rules identified for possible amendment. The committee members will then serve as discussion facilitators when each rule comes to the full Council for review and recommended action. The Evidence and Civil Procedure Committee met three times over the summer. They completed their discussion regarding the Deadman's statutes, and began discussing the Rule of Completeness, Statements by Injured Persons, and the Other Acts Rule. During the course of their discussions, the committee realized that these issues often took longer to resolve than they initially estimated and that there was a considerable amount of information to review in conjunction with each rule. Attorney Southwick recommended that the Council's discussion focus on only one rule at a time due to the amount of material (case law, statutes from other states, federal rules, law review articles, etc.) associated with each rule. Attorney Southwick reported that the committee initially suggested repeal of the Deadman's statutes, but after further discussion, they reconsidered and discussed amending to add some of procedural safeguards such as those found in Missouri's Deadman's statute. After some debate, they returned to their original position and recommend repeal.

The committee also suggested that a bias rule (such as Minnesota's bias rule) could be added to the rules of evidence, although they have not discussed any specific language at this time. Attorney Southwick confirmed that Wisconsin's rules of evidence do not currently include a bias rule. Council members generally agreed that some type of bias rule would be appropriate to remind the court and parties to slow down and consider factors that may impact the weight given to evidence. Council member Schultz generally opposed the addition of a bias rule to replace the Deadman's statute, stating that he does not feel it is necessary. Attorney Southwick added that the committee is concerned that the repeal of the Deadman's statutes might leave a hole in the rules and that a bias rule could fill that gap.

MOTION: Council member Wagner moved, seconded by Council member Schultz, to recommend repeal of Wis. Stat. §§ 885.16 and 885.17. The motion was approved unanimously.

Chair Stephens asked the committee to also suggest an alternative, such as a bias rule, for further discussion by the Council. Chair Stephens also reminded the Council that the process for review of the rules of evidence will involve reviewing each rule and reaching a recommendation from the full Council. Once the process is complete for all the rules, a comprehensive bill and/or supreme court petition will be prepared containing all of the recommended changes.

Attorney Southwick inquired as to whether the Council has a preference regarding the next rule the committee brings forward. Several Council members indicated that the “other acts” rule will be a large undertaking. Chair Stephens suggested that a bias rule may be the next logical step, followed by statements by injured persons.

V. Discussion and/or Action Regarding Publication of Legal Notices

Vice-Chair Hanan stated that Attorney Heuer wrote her regarding his concern about impending newspaper bankruptcies and the publication of legal notices in official newspapers. When it was discussed last spring, council members generally did not view this topic as appropriate for Council action at this time. Vice-Chair Hanan drafted a response to Attorney Heuer indicating that the Council believes there is sufficient flexibility in the current rule, so the Council would not be taking any action at this time. However, they will continue to monitor this issue. Attorney Southwick distributed the draft letter to council members for review prior to the meeting. She also updated the Council on relevant pending legislation in other states.

MOTION: Council member La Fleur moved, seconded by Council member Christopher, to approve the letter drafted by Vice-Chair Hanan, and ask Attorney Southwick to send the letter to Attorney Heuer. The motion was approved unanimously.

IV. Committee Reports

A. Appellate Procedure

Chair Stephens reported that the Appellate Procedure Committee drafting workgroup (consisting of Greg Weber, Peg Carlson, Meredith Ross and Chair Stephens) met several times over the summer to work on the presentence investigation amendments and incorporate some of the comments received by interested parties. Their changes are ready for review by the full committee, and they will begin discussing them at their meeting later today.

The three companion appellate procedure bills introduced and co-sponsored by Senator Taylor and Representative Hebl (2009 Wis. Acts 25, 26, and 27) were signed by the Governor at the Council’s June meeting.

Chair Stephens reported that the committee had another rule change petition to the supreme court involving changes to the procedures surrounding petitions for discretionary review by the supreme court (Petition No. 04-08). The project came to the Council from the court, and the petition was granted this past council year (2008 WI 108).

Chair Stephens thanked the legislators who supported Council bills, the State Bar for publishing the September article highlighting the recent work of the Council, as well as the committee members who worked on these projects.

B. Criminal Procedure

Committee chair Schultz reported that the Legislative Reference Bureau (LRB) has completed drafting another chapter of the criminal procedure amendments. The final chapter is in editing, so he believes the subcommittee will be ready to meet to respond to LRB questions in the near future.

C. Evidence and Civil Procedure

Attorney Southwick reported that in addition to their work on the rules of evidence, the committee has continued to discuss the small claims matter involving calculation of “days” under chapter 799. They discovered that the directions accompanying the court form to request a trial conflict with the holding of at least one unpublished appellate court opinion. She is currently working with Council member Voelker to obtain additional information from court staff.

VIII. Other Business

A. PPAC Liaison’s Report

Council member Voelker reported that they are working on a petition regarding court security rule changes.

B. Council Attorney’s Report

Attorney Southwick distributed photographs and pens from the Governor’s signing of the Council’s three appellate procedure bills to Council members. She thanked Council member Bertz for providing the copies of the photographs.

Attorney Southwick reported that the Institute for the Advancement of the American Legal System (IAALS) has not completed the draft of proposed rules for a possible pilot project. They now anticipate completion of the draft rules in October. She will continue to monitor this issue.

IX. Adjournment

The Council adjourned by consensus at 10:50 a.m.