

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 16, 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, William C. Gleisner, Christian A. Gossett, Devon M. Lee, Dennis Myers, Representative Jim Ott, Benjamin J. Pliskie, Honorable Gerald P. Ptacek, Chuck Stertz, Honorable Robert P. Van De Hey, Senator Van H. Wanggaard, Greg M. Weber, Amy E. Wochos, Honorable Annette Kingsland Ziegler.

MEMBERS EXCUSED: Tracy K. Kuczenski, J. Denis Moran, Thomas L. Shriner, Honorable Jeffrey A. Wagner, Professor Steven Wright.

OTHERS PRESENT: April M. Southwick, Judicial Council Attorney; Sarah Ward Cassidy and Nancy Rottier, Director of State Court's office; Lynne Davis, Wisconsin State Bar; Mike Ottelien, Racine County GOP.

I. Call to Order, and Roll Call

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

II. Approval of September 18, 2015 Minutes

MOTION: Council member Myers moved, seconded by Council member Wochos, to approve the September 18, 2015 minutes. Motion approved with Council member Ziegler abstaining.

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

Attorney Southwick circulated a memo summarizing the August hearing. At the hearing, there were some questions regarding recompense. Due to a 2005 amendment, under current Wis. Stat. § 969.13, a forfeited cash bond can be awarded first in the form of recompense to compensate the alleged victim(s). AB 90/SB 82 repeals reference to recompense in the bail forfeiture statute and first applies forfeitures to the payment of costs.

Attorney Southwick conducted some additional research on this issue and learned that the court system strongly favors repeal of the references to "recompense" as proposed in the Council's bill. Court operations explained that recompense was never broadly implemented following the 2005 amendment because some judges have constitutional concerns about awarding recompense to victims before a finding that a crime had been committed and before knowing the extent (or lack thereof) of a victim's damages. Almost all judges hold off on awarding damages to victims until after sentencing. Attorney Southwick distributed a previous

letter from Judge Kitty Brennan urging the Governor to veto Act 447 amending s. 969.13, and further explaining the concerns of some members of the judiciary.

Council member Ott reported that his office is still waiting for the Department of Justice (DOJ) and the Wisconsin District Attorneys Association (WDAA) to submit their proposed amendments to the bill. Council member Wanggaard reported that DOJ informed his office that the two groups are working together. They are breaking down the issues into a one or two page document, which will be completed soon.

IV. Discussion and/or Action Regarding Review of Wisconsin Rules of Evidence

Prior to the meeting, Attorney Southwick circulated a memo dated October 9, 2015, containing recommendations from the Evidence & Civil Procedure Committee regarding some additional changes to the proposed amendments to Rule 906.09, impeachment by evidence of conviction of crime.

When the Council circulated the proposed amendments for feedback, the chief judges suggested that Rule 906.09 should reference expungement. The Evidence & Civil Procedure Committee agreed that expungement is becoming very common and should be addressed in the rule amendment. Current Wisconsin case law states that expunged convictions are not admissible under Rule 906.09.¹ The committee recommends that the Judicial Council Committee Note should be modified to add the following sentence, "Sub. (2) does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule. *State v. Anderson*, 160 Wis.2d 435, 437 (Ct. App. 1991)."

Council member Ptacek expressed concern that the reference to expungement is not in the text of the statute. Attorney Southwick stated that the Judicial Council Notes are routinely published with the text of the rule. The Council discussed the effect of expungement on the availability of records of the conviction. The Council also discussed that the facts of the underlying conviction may be admissible under other evidentiary rules.

The Evidence & Civil Procedure Committee also recommends, based on advice from the Legislative Reference Bureau, that the Council retain the current numbering of the subsections of Rule 906.09.

MOTION: Council member Ptacek moved, seconded by Council member Wochos, to approve the two recommended changes from the Evidence & Civil Procedure Committee, as contained in the memo. Motion approved with Council members Ott, Wanggaard, and Ziegler abstaining. Council member Ziegler suggested that the committee consider using the term "expunction" instead of "expungement" in the Note.

¹ *State v. Anderson*, 160 Wis.2d 435, 437 (Ct. App. 1991) ("evidence of a conviction expunged under sec. 973.015(1), Stats., is not admissible under sec. (Rule) 906.09(1), Stats., to attack the credibility of a witness").

Nancy Rottier provided an update on the status of the proposed amendments to the expungement statute contained in a bill drafted by a court committee.

The Council discussed whether a specific reference to expunction should be added to the text of the bill.

MOTION: Council member Ptacek moved, seconded by Council member Gleisner, to refer the issue back to the committee for further consideration regarding amending the proposal to include a reference to expunction in the bill text. Motion approved with Council member Fitzpatrick opposed.

V. Committee Reports

A. Appellate Procedure

Committee chair Ptacek reported that the committee continues to work on reorganizing the procedural rules for prisoner challenges to agency decisions. The committee will review a further revised draft bill at today's meeting, and intends to forward it to the full Council for review.

The committee has also been studying possible amendments to Rule 809.15, the record on appeal. A draft amendment was nearly complete, but over the summer the clerk of the court of appeals and supreme court filed a rule change petition seeking amendment to Rule 809.15 to address issues related to electronic records. With the exception of one area, the amendments requested by the court clerk generally do not address the same issues the committee seeks to address in its proposed changes. A public hearing was held earlier in the week on the rule changes proposed by the court clerk. The committee will receive an update on the hearing at today's meeting.

The committee has begun discussing a potential inconsistency in Rule 809.62 that (1) permits the respondent to a petition for review to raise issues not raised in the petition, but (2) limits the "parties" on review to arguing issues raised in the "petition." . The committee has also been discussing size and number of briefs in multiparty cases. The chief staff attorney for the court of appeals has submitted a proposed rule draft for committee consideration.

B. Criminal Procedure

Committee chair Blanchard reported that the committee continues to research possible topics for study, but has not identified any areas for the Council's consideration. Members continue to discuss search warrants and the inception of electronic communication, but no specific problems or provisions requiring updates have been identified by prosecutors.

The committee considered the issue of preservation of evidence, but did not support presenting it to the Council for consideration as a potential new project. The committee identified the need to reevaluate the penalties for sexual contact between consenting teenagers,

but then learned that two professors from the University of Wisconsin Law School are working with a legislator on the issue. The committee continues to follow their work.

Attorney Southwick noted that the committee will likely be very busy once the WDAA and DOJ provide proposed revisions to the criminal procedure bill.

C. Evidence and Civil Procedure

In Committee chair Shriner's absence, Attorney Southwick reported that the committee continues to work on its recommendation to the Council regarding how to proceed with adoption of the proposed amendments to the rules of evidence. The proposed changes could be adopted by the supreme court or the Legislature, or a combination of the two.

The committee also 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 statute (Rule 23). Attorney Southwick noted that the Wisconsin Access to Justice Commission has filed a petition to amend s. 803.08 to add a *cy pres* provision.

Council member Gleisner proposed canceling today's committee meeting due to the unavailability of several members. Committee members generally supported that suggestion, so Attorney Southwick will post notice of the cancelation.

VI. Other Business

A. PPAC Liaison's Report

Nancy Rottier reported that PPAC has not met. The next meeting PPAC meeting is scheduled in December.

B. Council Attorney's Report

Attorney Southwick had no further report.

VII. Adjournment

Attorney Southwick predicted that the November meeting will have a longer agenda so she suggested that members allow extra time for the meeting.

The Council adjourned by consensus at approximately 10:40 a.m.