

STATE OF WISCONSIN

SUPREME COURT

---

In re:

WISCONSIN STATUTES §§ 885.16, 885.17, 885.205, 906.01

---

**MEMORANDUM IN SUPPORT OF  
PETITION OF WISCONSIN JUDICIAL COUNCIL  
FOR AN ORDER REPEALING WIS. STATS. §§ 885.16, 885.17, 885.205;  
AND AMENDING WIS. STAT. § 906.01**

April M. Southwick  
WI State Bar No. 1070506  
110 East Main Street  
Madison, WI 53703  
(608) 261-8290  
(608) 261-8289 (facsimile)  
april.southwick@wicourts.gov

ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

April 18, 2016

**TABLE OF CONTENTS**

**INTRODUCTION.....1**

**DISCUSSION.....1**

**I. Wis. Stats. §§ 885.16, Transactions with Deceased or Insane Persons,  
and 885.17, Transaction with Deceased Agent.....1**

**A. Historical Overview of Deadman’s Statutes Generally.....1**

**B. Wisconsin’s Deadman’s Statute.....2**

**1. Because the Deadman’s statute is highly disfavored, Wisconsin  
courts have limited its application.....3**

**2. Exceptionally strict rules for application produce harsh results.....4**

**C. Judicial Council Recommendations.....5**

**1. Adopt new Rule 906.16, Bias of witness.....5**

**2. Amend Wis. Stat. § 906.01, General rule of competency, to remove  
the references to the Deadman’s statutes.....6**

**II. Wis. Stat. § 885.205, Privileged Communications.....7**

**III. Supreme Court’s Rule-Making Authority.....10**

**A. Evidentiary Rules.....11**

**B. Historical Examples.....11**

**IV. Judicial Council Drafting Process.....14**

**CONCLUSION.....18**

## INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to repeal WIS. STATS. §§ 885.16, 885.17 and 885.205; and amend WIS. STAT. § 906.01. This petition is directed to the Supreme Court’s rule-making authority under WIS. STAT. § 751.12. The court’s authority to act on the recommendations contained in the petition will be addressed in detail in Part III of this memorandum.

## DISCUSSION

### **I. Wis. Stat. § 885.16, Transactions with deceased or insane persons, and 885.17, Transactions with deceased agent.**

#### **A. Historical Overview of Deadman’s Statutes Generally**

Deadman's statutes are based upon “a dark view of human nature.”<sup>1</sup> The rationale behind these statutes is rooted in the philosophy that “if the lips of one party to a transaction have been sealed by death, it is only fair that the other party's be sealed by law.”<sup>2</sup> It has been justified by the belief that “it is better public policy to protect the estate from possible fraudulent claims than to allow testimony of the living which cannot be counteracted or refuted by the testimony of the deceased.”<sup>3</sup> Justification also stems from the common-law belief that there would be “a powerful temptation for a party to misrepresent the ‘transaction or communication’ he had with the deceased party, who

---

<sup>1</sup> 7 Daniel D. Blinka, Wisconsin Practice: Evidence 254 (1991).

<sup>2</sup> Mark Reutlinger, Evidence Essential Terms And Concepts 154 (1996).

<sup>3</sup> *Kemmerer v. Ecke*, 114 N.W.2d 803, 806 (Wis. 1962).

obviously could not rebut his testimony.”<sup>4</sup>

Today, many believe the archaic rule supports injustice by preventing honest claimants from proving their case, so most states have rejected the Deadman's statute.<sup>5</sup> As the accompanying appendix details, approximately 37 states have repealed, superceded, or simply never adopted a Deadman's statute. Most states that retain some form of a Deadman's statute contain exceptions to the general rule prohibiting an interested witness's testimony or are deliberately limited in their effect.<sup>6</sup>

The American Bar Association, the Commissioners on Uniform State Laws, and the Advisory Committee on the Federal Rules of Evidence have all advocated for the abolition of Deadman's statutes.<sup>7</sup> The Wisconsin State Bar has advocated for the repeal of Wisconsin's Deadman's statutes for decades.<sup>8</sup>

## **B. Wisconsin's Deadman's Statutes**

The Deadman's statute was first codified in Wisconsin in 1858.<sup>9</sup> Unlike those in most other states, Wisconsin's Deadman's statute lacks limits and exceptions, making it

---

<sup>4</sup> *Havlicek/Fleisher Enter., Inc. v. Bridgeman*, 788 F. Supp. 389, 396-97 (E.D. Wis. 1992).

<sup>5</sup> See 50-state survey at Appendix 1.

<sup>6</sup> *Id.*

<sup>7</sup> Michael M. Martin, *Basic Problems of Evidence* at 139 (6th ed. 1988).

<sup>8</sup> *Gerczak v. Gerczak*, 2005 WI App 168, ¶ 13, 285 Wis.2d 397, 702 N.W.2d 72.

<sup>9</sup> L.1858, c. 134, § 2. For a discussion of the history of the statute, see Frank L. Mallare, *Wisconsin Civil Trial Evidence* 12 n.80 (1967). There are currently two Deadman's statutes, found in ss. 885.16 and 885.17, dealing with transactions with deceased persons and with deceased agents, but they are to the same effect and will be dealt with here as if they were a single Deadman's statute.

potentially more severe in its application than those of other states.<sup>10</sup> The wording of the statute is cumbersome, but it essentially disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication if the witness has a personal interest in the outcome of the case, or if a named party to a lawsuit derives a personal interest through that particular witness.<sup>11</sup>

*1. Because the Deadman's statute is highly disfavored, Wisconsin courts have limited its application.*

As far back as 1970, the Wisconsin Supreme Court has found no rational basis for the Deadman's statute, and concluded that not allowing a witness who has an interest in a controversy to testify is simply "archaic."<sup>12</sup> Over the years, Wisconsin's appellate courts have successfully searched for ways to limit the statute's application.<sup>13</sup>

The Wisconsin Supreme Court has in effect directed that courts "alleviate the harshness of the rule by insisting upon exceptionally strict rules for its invocation."<sup>14</sup> For example, the Wisconsin Supreme Court has adopted a narrow interpretation of

---

<sup>10</sup> *In re Estate of Ford*, 23 Wis.2d 60, 126 N.W.2d 573, 576 (1964) ("No case has been cited nor have we found one where this court has permitted, over proper objection, an interested survivor to testify as to conversations or transactions with or in the presence of an agent of the deceased.")

<sup>11</sup> *In re Estate of Christopherson*, 2002 WI App 180, ¶ 17, 256 Wis. 2d 969, 982-83, 650 N.W.2d 52, 59.

<sup>12</sup> *Estate of Molay*, 46 Wis.2d 450, 458, 175 N.W.2d 254, 259 (1970).

<sup>13</sup> *See Estate of Nale*, 61 Wis.2d 654, 659, 213 N.W.2d 552 (1974).

<sup>14</sup> *Molay*, 46 Wis.2d at 459; *see Havlicek/Fleisher Enter., Inc.*, 788 F.Supp. at 400 (applying Wisconsin law and stating: "Since current law expresses disdain for the Dean Man's Statute, this Court is obliged to construe it narrowly and limit its application whenever possible.").

“transaction” as used in the statute.<sup>15</sup> The statute does not bar a witness from testifying as to his or her observations and description of an event or a physical situation, if such testimony does not involve a mutual transaction in which the deceased actively participated.<sup>16</sup>

There are also strict rules for the invocation of the Deadman's statute. For example, an objection under s. 885.16 must be addressed not to the admissibility of the evidence, but to the witness's competency to testify about a particular conversation or transaction.<sup>17</sup> This strictly-enforced requirement about the precise wording of the objection has resulted in its being referred to as a “plague” on the trial bar.<sup>18</sup>

2. *Exceptionally strict rules for application produce harsh results.*

The strict requirements for application of the Deadman's statutes are the result of the disfavor with which courts view it, and they can produce harsh results.<sup>19</sup> Failure to make the proper objection constitutes a waiver of the statute's protections.<sup>20</sup> In the *Giese* case, even though the objection was modified to phrase it in terms of incompetency of witness, the court of appeals found the objector had waived the competency objection by incorrectly making an earlier objection to admissibility of the testimony.<sup>21</sup>

---

<sup>15</sup> *Seligman v. Hammond*, 205 Wis. 199, 206, 236 N.W. 115 (1931).

<sup>16</sup> *Krantz v. Krantz*, 211 Wis. 249, 255, 248 N.W. 155 (1933), *overruled in part on other grounds by Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis.2d 91, 118 N.W.2d 140 (1962).

<sup>17</sup> *Carson*, 32 Wis.2d at 288, 145 N.W.2d 112.

<sup>18</sup> *Carson v. City of Beloit*, 32 Wis.2d 282, 288, 145 N.W.2d 112 (1966).

<sup>19</sup> *Giese v. Reist*, 91 Wis.2d 209, 222, 281 N.W.2d 86 (1979).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 224.

The Federal Rules of Evidence do not contain a Deadman’s statute.<sup>22</sup> When the Judicial Council originally recommended adoption of Wisconsin's Rules of Evidence, based on the federal rules, it also recommended eliminating the Deadman's statutes from Wisconsin’s evidentiary rules.<sup>23</sup> Although that recommendation was ultimately not adopted by the court in 1973, it should be noted that the court’s order is silent with regard to the reason it retained the Deadman’s statutes.<sup>24</sup>

### **C. Judicial Council Recommendations**

Because the Deadman’s statute continues to be disfavored, archaic and a “plague” on the trial bar, the Judicial Council again recommends repeal of Wis. Stats. §§ 885.16 and 885.17. To the extent that there is still any slight public policy supporting retention of the Deadman’s statutes, the same policy can be satisfied through the creation of a general bias rule, as recommended in the Judicial Council’s accompanying petition and supporting memorandum to amend and create certain evidentiary rules.

#### *1. Adopt new Rule 906.16, Bias of witness.*

Proposed new s. 906.16 would read as follows:

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

---

<sup>22</sup> *Rutter v. Copper*, 2012 WI App 128, ¶ 13, 344 Wis. 2d 596, 604, 824 N.W.2d 885, 889.

<sup>23</sup> 56 MARQ. L. REV. 155, 279 (1973) (“The Dead Man's Statutes, ss. 885.16 and 885.17, are repealed as circumscribed relics of the obsolete principle of disqualification for interest.”).

<sup>24</sup> 59 Wis. 2d R1 (1973).

The newly proposed bias rule permits impeachment of all witnesses on the ground of bias, without the harsh impact of banning the testimony of an interested witness. It is a balanced approach that recognizes the original public policy concerns behind the Deadman's statute.

2. *Amend Wis. Stat. § 906.01, General rule of competency, to remove the references to the Deadman's statutes.*

Long before enactment of the Federal Rules of Evidence, the United States Supreme Court, in *Rosen v. United States*, seemed to be moving away from the stringent common law position, recognizing that “truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding ... leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting the witnesses as incompetent ....”<sup>25</sup> The United States Supreme Court has recognized that courts and legislatures began acting to remove testimonial disabilities from witnesses during the nineteenth century.<sup>26</sup> Over the past several decades, most states that still had them have repealed specific exceptions to competency in favor of a more general rule of competency. The Judicial Council recommends that Wisconsin follow suit and eliminate the reference to the Deadman's statutes in s. 906.01, as follows:

Every person is competent to be a witness except as ~~provided by ss. 885.16 and 885.17 or as~~ otherwise provided in these rules.

---

<sup>25</sup> 245 U.S. 467 (1918) (rejecting the common law rule of witness disqualification based on a prior criminal conviction).

<sup>26</sup> *Funk v. United States*, 290 U.S. 371, 377, 54 S. Ct. 212, 214, 78 L. Ed. 369 (1933).

## II. Wis. Stat. § 885.205, Privileged Communications

This provision was brought to the Judicial Council’s attention by a request from the Legislative Reference Bureau (LRB). An LRB attorney asked the Judicial Council to study Wis. Stat. § 885.205, which appears to create a privilege for communications between a student and a dean of students or a school psychologist.<sup>27</sup> The LRB attorney noted that Wis. Stat. § 905.04, known in Wisconsin as the “physician-patient privilege,” also includes privileged communications between a patient and a psychologist.<sup>28</sup>

The Judicial Council’s Evidence & Civil Procedure Committee initially considered whether the privileges in s. 885.205 could be incorporated into chapter 905. The committee noted that, when Wisconsin’s Rules of Evidence were adopted, several privilege statutes were moved out of chapter 885 and into chapter 905. However, the language in s. 885.205 is very different from the other privilege rules in chapter 905, and it could potentially create a conflict.<sup>29</sup> For example, other privileges allow the privilege holder to prevent the person holding the information from testifying. Sec. 885.205 simply prohibits disclosure by the person possessing the information. Also, it is not applicable in criminal cases.<sup>30</sup>

---

<sup>27</sup> Email from Robert Nelson to April Southwick, dated February 24, 2010 (copy on file with author).

<sup>28</sup> *Id.*

<sup>29</sup> Minutes from the Judicial Council’s Evidence & Civil Procedure Committee, dated October 18, 2013 (copy on file with author).

<sup>30</sup> Minutes from the Judicial Council’s Evidence & Civil Procedure Committee, dated March 21, 2014 (copy on file with author).

Upon further study, the committee also noted that there are a number of internal drafting inconsistencies in s. 885.205, which are likely to cause confusion and make the rule difficult to apply. While s. 885.205 is titled "Privileged Communications," the word "privilege" is not contained in the text of the statute. Sec. 885.205 appears to be drafted more like a rule of confidentiality than a rule of privilege. It also has limited applicability in criminal cases, allowing deans to testify, but not school psychologists. For no apparent reason, the exceptions in subs. (2) and (3) are applicable to deans, but not to school psychologists.<sup>31</sup>

The Evidence & Civil Procedure Committee considered whether s. 885.205 is a useful rule that should be preserved. Members generally agreed that there does not appear to be a good reason to extend a "privilege" to deans. In reaching that conclusion, the committee asked the following question: "If there is a sound reason for this 'privilege,' why doesn't it extend to principals or superintendents?" The conclusion was that the rule lacks a sound reason for its existence.

During its study, the committee was unable to identify any person or entity that was relying on the rule, and only minimal reference to it. It is only cited in one unpublished opinion in which the court of appeals noted, "The court quashed the subpoena on the strength of § 885.205, Stats. The proper ground for quashing the subpoena, however, was § 905.04, Stats."<sup>32</sup> Thus, the only time the provision was cited

---

<sup>31</sup> Minutes from the Judicial Council's Evidence & Civil Procedure Committee, dated May 16, 2014 (copy on file with author).

<sup>32</sup> *State v. Seller*, 1996 WL 539238, 3.

in appellate case law was to point out how it had caused confusion and was improperly applied.

The committee considered the impact repeal of s. 885.205 would have on current law, taking into account the confidentiality provisions in chapter 118, general school operations. The committee was sensitive to the possibility that, although the rule does not appear to be invoked in case law, schools are likely to be aware of s. 885.205, and may have implemented policies or procedures based on it.<sup>33</sup>

The Wisconsin Association of School Psychologists and the Wisconsin Council of Administrators of Special Services were consulted regarding the future of s. 885.205, and both organizations indicated their support for its repeal. A representative of the Council of Administrators of Special Services called it "a trap for the unwary."<sup>34</sup>

The Judicial Council recommends that s. 885.205 should be repealed, as follows:

~~No dean of men, dean of women or dean of students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except:~~

~~(1) This prohibition may be waived by the student.~~

~~(2) This prohibition does not include communications which such dean needs to divulge for the dean's own protection, or the protection of those with whom the dean deals, or which were made to the dean for the express purpose of being communicated to another, or of being made public.~~

---

<sup>33</sup> Minutes, supra note 30.

<sup>34</sup> Minutes, supra note 31.

~~(3) This prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify.~~

### **III. Supreme Court's Rule-Making Authority**

Wisconsin's Constitution establishes three branches of government: the legislative, the executive, and the judicial.<sup>35</sup> The separation of powers doctrine, although not expressly stated, is inferred through several constitutional provisions.<sup>36</sup> The constitution does not explicitly deal with the supreme court's authority to adopt rules of practice or procedure, but that power is acknowledged by statute. WIS. STAT. § 751.12(1) states that, "The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts..." Sub. (2) states, "All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section."

Some overlap of power exists between the Wisconsin Supreme Court and the Legislature with respect to adopting procedural rules. While s. 751.12 authorizes the court to adopt rules regulating practice and procedure, it does not change the Legislature's ability to adopt statutes regulating the same areas. Sec. 751.12(4) expressly states, "This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or

---

<sup>35</sup> Wis. Const. art. IV, § 1; Wis. Const. art. V, § 1; Wis. Const. art. VII, § 2.

<sup>36</sup> Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."); Wis. Const. art. V, § 1 ("The executive power shall be vested in a governor ..."); Wis. Const. art. VII, § 2 ("The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court ..."); Id. § 3(1) ("The supreme court shall have superintending and administrative authority over all courts."); Id. § 4(3).

rules relating to pleading, practice, or procedure." While the constitution does not require an absolute division, in areas of shared power, one branch may not exercise power in a manner that will unduly burden or substantially interfere with another branch's essential role and powers.<sup>37</sup>

### **A. Evidentiary Rules**

Evidence rules are generally procedural in nature,<sup>38</sup> and courts have specifically ruled that rules of competency, such as Deadman's statutes, are procedural and not substantive law.<sup>39</sup> Therefore, adopting, amending, and repealing such evidentiary rules fall within the rule-making authority of the Wisconsin Supreme Court.

### **B. Historical Examples**

By petition filed December 4, 1972, the Judicial Council's Rules of Evidence Committee successfully petitioned the Wisconsin Supreme Court to adopt Wisconsin's

---

<sup>37</sup> *Demmith v. Wisconsin Judicial Conference*, 480 N.W.2d 502 (1992).

<sup>38</sup> Restatement (Second) of Conflict of Laws § 137 (The local law of the forum determines what witnesses are competent to testify and the considerations that may affect their credibility.); *Cervantes v. Time, Inc.*, 464 F.2d 986, 989 n. 5 (8th Cir.1972) ("Missouri seemingly adheres to the generally accepted principle that the admissibility of evidence is governed by the law of the State where the testimony is to be heard."), cert. denied, 409 U.S. 1125, 93 S.Ct. 939, 35 L.Ed.2d 257 (1973); *Turbyfill v. International Harvester Co.*, 486 F.Supp. 232, 235 (E.D.Mich.1980) (the admissibility of evidence is a procedural question).

<sup>39</sup> *Hortman v. Henderson*, 434 F.2d 77 (7th Cir.1970) (matter of competency of witnesses is to be determined in diversity actions under rules of evidence applied in courts of general jurisdiction of the state in which the United States court is held.); *Equitable Life Assur. Soc. of the U.S. v. McKay*, 306 Or. 493, 498, 760 P.2d 871, 874 (1988) (Oregon Supreme Court held that the Washington Deadman's Statute is procedural under Oregon law); *Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc.*, 895 So. 2d 225 (Ala. 2004) (abrogation of Dead Man's statute by evidentiary rule on competency of witnesses was a permissible exercise of court's rulemaking authority).

Rules of Evidence.<sup>40</sup> The court, pursuant to its inherent and implied power and its statutory rule-making authority, adopted the rules of evidence by order dated June 5, 1973.<sup>41</sup> The order promulgating the rules of evidence also amended and repealed a number of legislatively enacted statutes in chapter 885, including ss. 885.13 (“Party May Be Witness, Credibility,” replaced by s. 906.01); 885.14(1) and (2) (relating to adverse examinations at trial, depositions as evidence and rebuttal, and repealed by S.Ct. Order dated June 5, 1973, eff. Jan. 1, 1974); 885.18 (competency or privilege of one spouse as a witness in a prosecution against other, repealed by S.Ct. Order dated June 5, 1973, eff. Jan. 1, 1974); 885.19 (“A person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer” was replaced by s. 906.09); 885.20 (prohibited disclosure of confession made to clergy, and repealed by S.Ct. Order dated June 5, 1973, eff. Jan. 1, 1974); 885.21 (“Communications to Doctors” replaced by s. 905.04), 885.22 (attorney-client privilege replaced by s. 905.03), 885.28 (exclusion of admission by injured party, replaced by s. 904.12), 885.30 (relating to capacity of a witness to testify, and repealed by S.Ct. Order dated June 5, 1973, eff. Jan. 1, 1974); and 885.31 (testimony of deceased or absent witness, and repealed by S.Ct. Order dated June 5, 1973, eff. Jan. 1, 1974).<sup>42</sup> The

---

<sup>40</sup> Supreme Court Petition No. G72-03, dated December 4, 1972.

<sup>41</sup> Sup. Ct. Order, 59 Wis. 2d R1 (1973).

<sup>42</sup> *Id.* at Appendix I.

court also repealed several statutes in chapters 887, 889 and 891.

The Judicial Council's 1972 petition to adopt the Rules of Evidence recommended repeal of the Deadman's statutes.<sup>43</sup> While the court ordered the repeal or replacement of many statutes embodying rules of evidence, it did not act on the Deadman's statutes in its 1973 order.<sup>44</sup> Without explanation, the court deferred to the legislature to act on repealing the Deadman's statutes.<sup>45</sup> The Wisconsin Legislature has not taken up the invitation to consider the statutes – indeed, it appears to have completely ignored this problem for over forty years, the Judicial Council again asks the supreme court to exercise its rule-making authority to repeal ss. 885.16 and 885.17, and amend s. 906.01 to remove the reference to them.

Legislative failure to act regarding a rule of evidence has been considered by the United States Supreme Court. In considering the issue of the competency of one spouse to testify in behalf of the other in a criminal prosecution, the United States Supreme Court asked a very profound question that is applicable to the current consideration of Wisconsin's Deadman's statute.

It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the

---

<sup>43</sup> Petition, supra note 40.

<sup>44</sup> 59 Wis. 2d R1 (1973).

<sup>45</sup> Letter from Chief Justice Horace W. Wilkie to Reuben W. Peterson, Jr., Chair of the Wisconsin Judicial Council, dated November 11, 1974.

question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?<sup>46</sup>

The United States Supreme Court answered in the affirmative, and the Wisconsin Supreme Court is urged to do the same. While criticisms of the Deadman's statute are many and have existed for decades, nothing has been done about it, except to hedge it in with strict rules for its invocation. The time has come for real reform. The time has come to repeal this archaic evidentiary rule. Likewise, to avoid further confusion and potential conflict with the physician – patient privilege, the court should also repeal s. 885.205.

#### **IV. Judicial Council Drafting Process**

This rule change petition is another in a series resulting from a multi-year study of Wisconsin's Rules of Evidence conducted by the Wisconsin Judicial Council. This complex project began on March 20, 2009, when Marquette University Law School Professor Daniel Blinka gave a presentation to the Judicial Council highlighting changes that he believed would improve Wisconsin's evidentiary rules.<sup>47</sup> He explained that, in formulating his recommendations, he sought input from approximately one hundred circuit court judges. Professor Blinka suggested that the Judicial Council conduct a study and recommend amendments to codify Wisconsin case law, correct deficient rules, and fill some gaps in the rules.

---

<sup>46</sup> *Funk*, 290 at 381-382.

<sup>47</sup> Minutes of the Wisconsin Judicial Council, dated March 20, 2009 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes0309.pdf> (last accessed January 12, 2016).

The Judicial Council tasked its Evidence & Civil Procedure Committee with creating a work plan to undertake the project. The work plan included both the individual topics to be studied, as well as a process for the work to be accomplished.<sup>48</sup>

The committee proposed the following topics for study:

- Wis. Stat. § 901.07 the rule of completeness;
- Wis. Stat. § 904.12, the rule governing statements by injured persons;
- Wis. Stat. § 885.16, the Dead Man’s statute;
- Wis. Stats. 904.04(2), the “other act” rule, including the Sullivan test;
- Wis. Stat. § 906.08, evidence of a witness’s character for truthfulness;
- Wis. Stat. § 906.09, impeachment by prior criminal conviction;
- Wis. Stat. § 907.03 or § 907.05, the disclosure of an expert witness’s inadmissible bases;
- Wis. Stat. § 908.01, the definition of hearsay;
- Wis. Stat. § 908.045 (2), the hearsay exception for statements of recent perception;
- Wis. Stat. § 908.03(6), business records;
- Creation of a bias rule;
- Spoliation of evidence;
- Rule 502 of the Federal Rules of Evidence; and
- Creation of an expert witness privilege rule (codification of *Alt*).

With regard to process, the committee confined its work to one or two rules at a time. When the committee determined that specialized expertise would be helpful to its work, guest speakers were invited to attend and offer comments and recommendations.

The committee studied each rule contained in the work plan and discussed proposed amendments in advance of the Judicial Council’s discussion of those items. While the merits of each rule were debated by the full Council, the committee members acted as knowledgeable discussion facilitators. The committee also offered the Judicial Council a recommendation for each rule studied.

---

<sup>48</sup> Memorandum from Evidence & Civil Procedure Committee to Wisconsin Judicial Council, dated April 23, 2009 (copy on file with author).

Over the course of the Council's work on the rules, a few amendments to the work plan were approved. At the request of the Legislative Reference Bureau, Wis. Stat. § 885.205, privilege for communications between a student and a dean of students or a school psychologist, was added to the study. Three topics were removed from the work plan and designated for individual study and action by the Judicial Council, including spoliation of evidence, the expert witness privilege under the *Alt* case, and Rule 502 of the Federal Rules of Evidence.

The Council previously completed its work regarding updates to Wisconsin's rules modeled on Rule 502 of the Federal Rules of Evidence. As a result of its study, the Judicial Council proposed amendments to Wis. Stats. §§ 804.01, 805.07 and 905.03 relating to inadvertent disclosure of protected or privileged information based on the federal model. The amendments were adopted by supreme court order, and became effective January 1, 2013.<sup>49</sup> The Council has yet to arrive at a recommendation regarding spoliation of evidence or the expert witness privilege.

The Council has completed its work on the remaining evidentiary rules listed in the work plan. In February 2015, the Council circulated the proposed amendments to potentially interested groups, including the following: Wisconsin State Bar, Milwaukee County Bar Association; Dane County Bar Association; Western District Bar Association; Eastern District Bar Association; Wisconsin Association for Justice; Wisconsin Defense Counsel; State Public Defender's Office; Department of Justice;

---

<sup>49</sup> 2012 WI 114.

Committee of Chief Judges; Judicial Conference Legislative Committee; Court of Appeals Judges; Wisconsin Association of Criminal Defense Attorneys; Wisconsin District Attorneys Association; Association of State Prosecutors; Professor Keith Findley, University of Wisconsin Law School; and Professor Daniel Blinka, Marquette Law School. It was requested that they share the proposed changes with colleagues or members and provide any comments or feedback to the Judicial Council by May 14, 2015.<sup>50</sup>

The State Bar also published an article on the proposed changes to the evidence rules, including a notice to its readership that public feedback and comments were invited by the Judicial Council.<sup>51</sup>

The Council accepted comments until May 14, 2015. No objections to the proposed amendments were received, although a question from the committee of chief judges resulted in a recommendation to make an additional minor amendment to one of the rule proposals.<sup>52</sup>

As a result of this lengthy study, the Judicial Council now recommends repeal of ss. 885.16, 885.17 and 885.205, as set forth in the accompanying petition. The Council

---

<sup>50</sup> Correspondence to potentially interested parties from April Southwick, dated February 13, 2015 (copies on file with author).

<sup>51</sup> Wisconsin State Bar's INSIDE TRACK, Vol. 7, No. 4 (February 18, 2015).

<sup>52</sup> Memorandum from Evidence & Civil Procedure Committee to Wisconsin Judicial Council, dated October 9, 2015 (copy on file with author); Minutes of the Wisconsin Judicial Council, dated October 16, 2015 at <http://www.wicourts.gov/courts/committees/judicialcouncil/docs/minutes1015.pdf> (last accessed January 12, 2016).

also recommends amendment of three rules and the creation of a bias rule, as set forth in a separate petition and supporting memorandum filed herewith.

## CONCLUSION

“The public policy of one generation may not, under changed conditions, be the public policy of another.”<sup>53</sup> The time has come to repeal these out-dated evidentiary statutes. “The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And, since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.”<sup>54</sup>

With respect to the court’s rule-making authority, “[i]t is the purpose of the court to limit itself strictly to procedural matters and to consider those matters with the sole purpose of insuring that our procedural law may not be encumbered by useless or unfair rules which complicate and confuse the trial of cases or add to the expense of

---

<sup>53</sup> *Funk*, 290 U.S. at 381 citing *Patton v. United States*, 281 U.S. 276, 306, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263 (1930).

<sup>54</sup> *Funk* at 381.

litigation.”<sup>55</sup> Repealing antiquated and useless evidentiary rules fits squarely within that purpose.

The changes proposed in the Judicial Council's petition reflect the outcome of a multi-year study of Wisconsin's Rules of Evidence. The proposed changes are designed to improve the quality of legal practice in this state and reduce the number of errors and appeals, increasing court efficiency and effectiveness.

Therefore, the Judicial Council respectfully requests that the court repeal ss. 885.16, 885.17, and 885.205, and amend s. 906.01 to delete the references to ss. 885.16 and 885.17.

Dated \_\_\_\_\_, 2016

RESPECTFULLY SUBMITTED,  
WISCONSIN JUDICIAL COUNCIL

---

April M. Southwick, Attorney  
WI State Bar #1070506  
110 E. Main Street  
Madison, Wisconsin 53703  
(608) 261-8290  
Facsimile: (608) 261-8289  
[april.southwick@wicourts.gov](mailto:april.southwick@wicourts.gov)

---

<sup>55</sup> *Petition of Doar*, 248 Wis. 113, 121, 21 N.W.2d 1, 5 (1945).

## Appendix 1

Alabama	<i>Schoenvogel ex rel. Schoenvogel v. Venator Group Retail, Inc.</i> , 895 So.2d 225 (Ala. 2004) (state's Deadman's statute superceded by the enactment of Alabama Rule of Evidence 601)
Alaska	<i>Cavanah v. Martin</i> , 590 P.2d 41, 42 (Alaska 1979) ("Alaska has completely eliminated the common law disqualification of witnesses based on interest...")
Arizona	<i>Troutman v. Valley Nat'l Bank</i> , 826 P.2d 810, 812 (Ariz. Ct. App. 1992) (applicability of the Dead Man's statute is at the discretion of the trial court)
Arkansas	<i>Davis v. Hare</i> , 561 S.W.2d 321, 322 (Ark. 1978) (The dead man's statute was merely a rule of evidence and was therefore procedural in nature so it was expressly repealed by the state's adoption of the Uniform Rules of Evidence)
California	Cal. Evid. Code § 1261, Law Revision Commission Comments (The dead man statute operates unsatisfactorily... Hence, the dead man statute is not continued in the Evidence Code.)
Colorada	Colo. Rev. Stat. § 13-90-102 (generally prohibits testimony about communications with a deceased person except in four limited circumstances)
Connecticut	Conn. Gen. Stat. § 52-172 (expressly permitting declarations from a deceased person)
Delaware	Del. R. Evid. 601 (supersedes the Delaware's Deadman's Statute which was repealed)
Florida	Fla. Stat. ch. 90.602 (repealed 2005)
Georgia	Ga. Code Ann. § 24-6-601 (permits testimony from an interested witness)
Hawaii	<i>Hew v. Aruda</i> , 462 P.2d 476, 479 (a

	Deadman's statute was not adopted in Hawaii);
Idaho	I.R.E. 601 and Idaho Code § 9-202 (interested witness may testify as to any agreement or communication with the decedent in writing, does not apply when the action is not against the executor or administrator of an estate and the claim does not represent a demand against the estate, and does not apply if the testimony is being offered to defend against a counterclaim)
Illinois	735 Ill. Comp. Stat. 5/8-101 (permits testimony from an interested witness)
Indiana	Ind. Code § 34-45-2-4 (only applies to cases in which the executor or administrator is a party and a judgment may result for or against the estate)
Iowa	Iowa Code § 622.3 (1997) (permits testimony from an interested witness)
Kansas	K.S.A. 60-407 (abolishing disqualifications and privileges of witnesses)
Kentucky	Ky. Rev. Stat. Ann. § 421.210 (repealed Deadman's statute by Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky. Acts 936)
Louisiana	La. Rev. Stat. Ann. § 13:3721 (parole evidence permitted if certain conditions are met)
Maine	Me. Rev. Stat. Ann. tit. 16, ch. 1 (repealed 1977);
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 9-116 (extremely limited in scope)
Massachusetts	Mass. Gen. Laws ch. 233, § 65 (1997) (limited admissibility of declaration of decedent)
Michigan	Mich. Comp. Laws Ann. § 600.2166 (admissible if testimony is supported by material evidence tending to corroborate claim)
Minnesota	Minn. R. Evid. 616 (superceding Deadman's Statute and permitting

	testimony from an interested witness)
Mississippi	Miss. Code Ann. § 13-1-7 (repealed 1991)
Missouri	1985 amendment permits an adverse party to testify about dealings with a person who is deceased or becomes incompetent, and further allows past relevant statements of the deceased or incompetent party to be admitted under certain circumstances under MO. REV. STAT. § 491.010.2
Montana	Mont. R. Evid. 601 (abolishing the Deadman's Statute)
Nebraska	Neb. Rev. Stat. § 25-1202 (repealed by Laws 1975, L.B. 279, s. 75, p. 537)
Nevada	Nev. Rev. Stat. § 48.075 (“Evidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person”)
New Hampshire	N.H. Rev. Stat. Ann. § 516:25 (Repealed 1994, 57:1, II, eff. Jan. 1, 1995)
New Jersey	N.J. Stat. Ann. § 2A:81-2 (permits testimony if supported by clear and convincing proof)
New Mexico	N.M.S.A. 1953, § 20-2-5 (repealed by 1973 N.M.Laws, ch. 223, § 2, effective July 1, 1973)
New York	N.Y. C.P.L.R. 4519 (permits testimony regarding facts of any automobile, aircraft, or boating accident involving negligence and permits surviving spouse to testify regarding the deceased's contributions to jointly owned property), see also <i>Hadley v. Clabeau</i> , 1988, 140 Misc.2d 994, 532 N.Y.S.2d 221 (Sup.Ct. Cattaraugus Co.), affirmed, 1990, 161 A.D.2d 1141, 555 N.Y.S.2d 951 (4th Dep't) (the complexity of the rule, together with an inclination toward “leniency or

	distinction in application” in cases of perceived injustice, “has led to innumerable contradictory decisions both at the trial and appellate court levels”)
North Carolina	N.C. R. Evid. 601(c) (Subdivision (c) represents a narrowing of the scope of G.S. 8-51, the Dead Man's Statute), see also Brandis on North Carolina Evidence § 66 at 258, n. 62 (1982) (“[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel.”)
North Dakota	N.D. R. Evid. 601 (superceding North Dakota's Deadman's Statute and permitting testimony from an interested witness)
Ohio	<i>Johnson v. Porter</i> , 471 N.E.2d 484, 487 (Ohio 1984) (holding that Ohio's adoption of Rule 601 effectively abrogated the state's Deadman's Statute);
Oklahoma	Okla. Stat. tit. 12, § 2601 (1997) (abolished the state's Deadman's Statute)
Oregon	Or. Rev. Stat. § 40.310 (1995) (permits testimony from an interested witness)
Pennsylvania	42 Pa. Cons. Stat. Ann. § 5930 (permits testimony as to any communications with the deceased if the action or proceeding is by or against surviving or remaining partners, joint promisors, or joint promisees)
Rhode Island	R.I. Gen. Laws § 9-17-12 (1996) (permits testimony from an interested witness)
South Carolina	S.C. Code Ann. § 19-11-20, see also <i>Hanahan v. Simpson</i> , 485 S.E.2d 903, 909 (S.C. 1997) (South Carolina courts narrowly construe the statute “to limit its applicability to cases which clearly fall within its intended note.”)

South Dakota	S.D. Codified Laws § 19-19-601 (permits testimony from an interested witness)
Tennessee	Tenn. Code Ann. § 24-1-203 (1997) (limited to actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them)
Texas	Tex. Rev. Civ. Stat. Ann. art. 3716 (repealed 1983)
Utah	Utah R. Evid. 601 (permits testimony of an interested witness)
Vermont	Vt. Stat. Ann. tit. 12, § 1602 (in tort actions by or against representatives of deceased persons, relevant memoranda and declarations of the deceased are admissible)
Virginia	Va Code Ann. § 8.01-397 (permits testimony from an interested witness but corroboration required)
Washington	Wash. Rev. Code § 5.60.030 (applies only to oral evidence and actions of the decedent and can be waived under three circumstances)
West Virginia	<i>State Farm Fire &amp; Cas. Co. v. Prinz</i> , 231 W.Va. 96, 743 S.E.2d 907 (2013) (invalidated West Virginia's Deadman's statute)
Wisconsin	Wis. Stats. §§ 885.16 and 885.17 (“Deadman's statutes” prohibit witnesses from testifying about a communication between them and the decedent personally where they have an interest in the outcome of the action)
Wyoming	Wyo. Stat. Ann. § 1-12-102 (permits testimony from an interested witness but corroboration required)