



STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN May 18, 2018

The Judicial Council met at 9:35 a.m. in Room 328 NW, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Chair Thomas W. Bertz; Sarah Walkenhorst Barber; Judge Eugene A. Gasiorkiewicz; William C. Gleisner; Christian Gossett (by phone); Duane Harlow; Dennis Myers; Ben Pliskie; Judge Scott Needham (by phone); John R. Orton; Thomas L. Shriner; Steven Wright; Judge Robert VanDeHey; Senator Van H. Wanggaard (by phone); and Judge Jeffrey Wagner (by phone).

MEMBERS EXCUSED: Justice Annette Kingsland Ziegler; Sherry Coley; Diane Fremgen; Devon Lee; and Representative Ott.

OTHERS PRESENT: Lynn Davis, State Bar; and Margo Kirchner – Member-Elect.

I. Roll Call and approval of the Minutes of April 20, 2018.

Minutes were amended, and as amended approved. Margo Kirchner, newly elected member of the Judicial Council was introduced and provided some of her background.

II. Discussion of possible Council projects for next year. Suggestions include:

A. Consideration of the work product of the Evidence & Civil Procedure Committee regarding refinements to 2017 Act 235. How will Act 235 operate in practice, and what can be done to more fully adopt the Federal Rules on which Act 235 is supposed to be based?

Bill Gleisner noted that we have already discussed referrals to the Evidence & Civil Procedure Committee (ECP) and that A below can best be addressed by the ECP Committee Report now and going forward. Gleisner then noted that he put in B and C below because the proponents of Act 235 made it clear that the reason for 235 was to federalize our Rules of Civil Procedure. But the proponents “cherry picked” some federal rules but they failed to pick some important additional rules. They also added things that have never been in the federal rules or in any other state’s rules of civil procedure. For example, Section 7 of Act 235 adds a rule which specifies that upon a motion to dismiss, for judgment on the pleadings or a motion for a more definite statement, the circuit court must stay all proceedings in an action for 180 days. Perhaps it is time to consider just replacing our rules of civil procedure with the Federal Rules of Civil Procedure. In effect, the FRCP would become the default.

B. Where possible, is it time to consider adopting all relevant provisions of the Federal Rules of Civil Procedure in place of Wisconsin’s existing Rules of Civil

Procedure? Rather than piecemeal adoption of the Federal Rules (as occurred imperfectly under Act 235), is it now time to consider the Federal Rules as the “Gold Standard” and proceed from the assumption that the Federal Rules are superior unless it is shown that they will not work in Wisconsin?

C. In conjunction with Marquette Law Professor Dan Blinka, the Council recently completed an extensive review of Wisconsin’s Rules of Evidence. In view of Act 235, is it time to more thoroughly compare the Federal Rules of Evidence and Wisconsin’s Rules of Evidence?

With regard to both B and C, Tom Shriner expressed reservations about stating that we will adopt all the federal rules and then made the following points. The residual source of judicial rules does not reside in the federal government. Our rules do not come from the federal government. In fact, it is in the states where personal injury or negligence litigation occurs, breach of contract cases (some of which end up in small claims) exist, and it is hard to imagine handling such litigation the same in state and federal court. In addition, there is little family law in federal court.

As you can see from the ECP Minutes of the last committee meeting, just adopting the federal rules wholesale probably won’t work. Just the idea that we would have pretrial conferences of the sort envisioned by the federal rules in all personal injury actions would probably overwhelm the state courts.

The best approach might be to take a look at the topic of rules of civil procedure from a “30,000-foot level” and see if there are places where adopting the federal approach might make sense. There are some federal rules that will work. For example, adopting FRCP 65 (regarding injunctions) might be a major improvement over current state rules. Chapter 813 reminds him a little of the old class action rule. Ch. 813 is a mid-Nineteenth Century rule that badly needs updating.

When we think about the rules of civil procedure from a higher (30,000-foot) level, we think about the fact that there are divisions of the state courts that utilize the rules of civil procedure but which are completely unsuited to the federal model. For example, family law, and all the things that are encompassed there, like property division and custody. Discovery is an example. Another example would be probate.

The fact is the state court system is not identical to the federal system. They are different environments designed to accomplish different goals. If we adopted the federal rules, at a minimum there would need to be some significant exceptions.

Mr. Gleisner noted that what has been referred to the ECP are questions about whether we should bring over from the federal model rules which are necessary to “flesh out” what has been adopted in Act 235. Gleisner stated that in terms of a 30,000-foot review that is something that the Council could do and then send projects to the ECP as necessary.

Mr. Gleisner stated that we also need to be mindful that as we proceed with any type of federalization project we will need to get stakeholder input so that we are able to gauge the needs of state practitioners and state courts.

Judge Eugene Gasiorkiewicz noted that these rules don't take effect until July 1, and then asked if we were putting the cart before the horse. He has sought input from other judges with zero response. He has not received any input from any judge concerning the 180-day stay provision, and he doesn't know what that means. The Judge said that he wasn't certain that adopting more federal rules will be of much help to state practitioners. The federal rules already are far from clear, with different interpretations throughout the various federal circuits.

Professor Steven Wright inquired as to whether we just adopt the federal rules or the caselaw that interprets those rules. Mr. Gleisner stated that he believed that where we adopt a federal [like the proportionality rule under FRCP 26(b)(1)], any case law interpreting 26(b)(1) would apply in our state courts. Judge Gasiorkiewicz disagreed and stated that he believed our Supreme Court could totally disagree with any federal precedent that came down under a federal rule we adopt. Mr. Shriner agreed. Mr. Orton stated that at best federal interpretations of federal rules we adopt would be persuasive authority, not binding on our state courts. Mr. Gleisner responded that he only meant to say that if there are federal interpretations of a rule adopted in Wisconsin, the federal interpretations would be at least persuasive authority.

Mr. Shriner said, and Mr. Gleisner agreed, that the point Mr. Gleisner was raising in B and C above is what are we going to do in this Council to keep ourselves busy. Mr. Shriner said there is no need to "keep ourselves busy." If there is no work for a time, it may make sense for the Council to undertake some scholarly review of the civil justice system at a 30,000-foot level.

Mr. Orton stated that we don't need to be focused just on the civil justice system. As we proceed, maybe issues will arise for review by the Appellate Procedure Committee or the Criminal Procedure Committee. We don't need to be focused on just the civil justice system. Mr. Shriner agreed and pointed out that the Legislature has now created a circumstance where an appeal is taken under Section 8 of Act 235 which is discretionary under the federal rule but which an "appellate court" (more correctly, "the Court of Appeals") must take. We need to consider the implications of this in terms of overall appellate procedure. He also finds it difficult to understand why the mere taking of an appeal under Section 8 should always result in a stay.

At a very minimum, Mr. Shriner thinks we should be looking to reorganize some of the new rules adopted in Act 235. For example, Section 8 has put this new appeal right into § 803.08(11), but it probably belongs in Chs. 808-809 which deal with appellate procedure.

MOTION: Mr. Shriner moves to have the Appellate Procedure Committee take up issues raised by Act 235's adoption of § 803.08(11). Mr. Gleisner seconded the motion which then passed unanimously.

Mr. Gleisner revisited points B and C above and stated there was no need to take any further action on those points now but would suggest that they be revisited in September after the Council returns from its summer break and after Act 235 has taken effect.

III. Discussion of Attorney Shriner's draft of a Judicial Council recommendation that the Legislature repeal Wis. Stat. § 887.015 and adopt the UUDA to replace it.

Mr. Shriner reports that he has submitted on behalf of the Council a recommendation to the Legislature that it repeal Wis. Stat. §887.015 and adopt the UUDA in its place. Mr. Shriner told Senator Wanggaard that he did not enclose the LRB draft but will forward it in the immediate future. Senator Wanggaard said that would be fine and told Mr. Shriner where to submit it. Mr.

Shriner noted that he addressed the recommendation to the Speaker of the Assembly and the President of the Senate.

Senator Wanggaard thanked the Council for its work and to state that it was very important to have the Council's assistance as we work through some of these complex issues. The Senator was also stated that he believes other legislators find value in the work of the Council.

IV. Report from Breakfast and Awards Committee.

Mr. Gleisner reported that the committee (consisting of him, Mr. Shriner and Mr. Orton) are ready to roll and the reception will take place, courtesy of Senator Wanggaard, in the Senate Parlor on June 15, 2018. While we won't be able to kill any fatted calves for the reception, we may be able to kill a fatted mouse and will have some refreshments. Invitations will go out to present and past members of the Council as well as the entire Supreme Court and the entire Court of Appeals.

Mr. Shriner then raised the issue of next year's calendar, which will be approved at the business meeting following the reception. Mr. Shriner noted that it has been our practice to meet on the third Friday of every month (except July and August). He proposed the following tentative calendar: First meeting, September 21, 2018; Second, October 19, 2018; Third meeting, November 16, 2018; Fourth meeting in December will be skipped because too close to Christmas; Fifth meeting, January 18, 2019; Sixth meeting, February 15, 2019; Seventh meeting, March 15, 2019; Eighth meeting in April will be skipped because too close to Easter; May 17, 2019; June 20, 2019. A final schedule will be presented at the June 15th business meeting.

V. Appointment of Nominating Committee for the purposes of selecting a slate of candidates for Chair and Vice Chair of the Judicial Council.

Judge Gasiorkiewicz, Judge Robert VanDeHey and Dennis Myers were appointed to this committee.

VI. Discussion concerning summer project between Gleisner and the State Law Library to facilitate the smooth continuation of the work of the Judicial Council.

Mr. Gleisner reported that it is his intention to work with the State Law Library over the summer on organizing the Council's archives, updating the Council's webpage, and studying digitizing of Council records. Mr. Gleisner asked for volunteers to assist with this project.

Mr. Shriner reported that the State Law Library would like to have the archives now at the State Historical Society moved to the State Law Library. He does not think the Historical Society will object, but he recommends a motion.

MOTION by Mr. Shriner that the Council authorize the State Law Library to take custody and control over all the archival records now located in the State Historical Society. Mr. Gleisner seconded and the motion passed unanimously.

VII. Part Two of the reinvigoration of the Council's Committee system. In order to emphasize the importance of Committee work to the proper and productive functioning of the Council, accompanying this Agenda the members will find the recent Minutes of the Evidence & Civil Procedure Committee and the Appellate Procedure Committee. At this meeting, reports will be made from:

Mr. Gleisner sent out the minutes of the two active committees for information purposes.

A. Evidence & Civil Procedure Committee.

Mr. Shriner referenced the April 2018 ECP minutes that were circulated and asked if anyone has any questions about the discussion we have had concerning Act 235. Mr. Shriner noted that our primary focus for the next few meetings will be Act 235. Thereafter, the ECP will look at service of process overseas and other issues which may arise.

B. Appellate Procedure Committee.

Judge VanDeHey gave the report even though he is no longer on the committee. He noted that the prisoner litigation bill is ready to be recommended to the Legislature. The other issue before the Committee deals with substitution of attorneys, which has occasioned more difficulty than one would expect. In addition, in view of Mr. Shriner's motion, the Committee will take up the issue of Section 8 of Act 235.

C. Criminal Procedure Committee.

Judge VanDeHey also discussed this committee, since he has transferred to this committee and will now serve as its chair. He noted that the committee hasn't met for some time and so it will require some reorganization. The Judge asked if the Criminal Procedure Committee could meet after the June 15th meeting in the Senate Parlor, and Senator Wanggaard stated that would be acceptable to him. So the Criminal Procedure Committee will meet in the Senate Parlor after the conclusion of the Council business meeting on June 15, beginning at approximately 11 a.m.

Mr. Gleisner also asked the Senator if he could reserve Room 328NW for the Evidence & Civil Procedure Committee for a meeting from 11 a.m. to noon. The Senator agreed to do that.

VIII. Adjournment.

Meeting adjourned at approximately 11 a.m.