



STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 16, 2018

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

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

MEMBERS EXCUSED: Justice Annette Kingsland Ziegler; Diane Fremgen; Representative Jim Ott; Sherry Coley; Ben Pliskie and Sara Ward-Cassidy.

I. Roll Call and approval of the Minutes of October 19, 2018.

Minutes were amended and then approved.

II. Discussion of e-Discovery, Clawbacks and related issues under Act 235.

Gleisner gave a presentation regarding issues in Act 235 which have been referred to the Evidence and Civil Procedure Subcommittee and why more should be referred. According to Gleisner:

“By looking at Act 235’s modification of Wisconsin’s e-discovery rules and Wisconsin’s rules designed to avoid discovery mishaps (like clawback rules), I submit that one can see why the Judicial Council is necessary in order to help remove the rough edges created by Act 235.

“At present, the Council has referred Act 235 to the Evidence & Civil Procedure Subcommittee (ECP). The ECP is studying Act 235 to determine: 1) How Act 235 compares to the Federal Rules of Civil Procedure; and 2) what types of actions should be exempt from some or all of the provisions of Act 235 (such as divorce or injunction proceedings).

“However, just as important, how do the new rules created by Act 235 relate to Wisconsin’s existing Rules of Civil Procedure? And here I won’t limit myself to just clawback rules. I limited myself too much when I spoke just of clawback rules. I will instead compare the new rules created by Act 235 with the problems identified in the Document Mishap article and also with the e-discovery rules contained in Wis. Stat. 804.09.

“In terms of e-discovery, Act 235 reads as follows:

“**SECTION 14.** 804.01 (2) (e) lg. of the statutes is created to read:

“A party is not required to provide discovery of any of the following categories of electronically stored information absent a showing by the moving party of substantial need and good cause, subject to a proportionality assessment under par. (am) 2.:

- a. Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.
- b. Backup data that are substantially duplicative of data that are more accessible elsewhere.
- c. Legacy data remaining from obsolete systems that are unintelligible on successor systems.
- d. Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources only if the requesting party shows good cause, considering the limitations of par. (am). The court may specify conditions for the discovery.

“Frankly, it is as though Act 235’s new e-discovery rules were created by taking a meat cleaver to the existing e-discovery rules in Wisconsin. For example, Wis. Stat. 809.04(2)(b)2 provides:

2. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
 - a. A party shall produce documents as they are kept in the usual course of business **or shall organize and label them to correspond to the categories in the request;**
 - b. If a request does not specify a form for producing electronically stored information, **a party shall produce it in a form or forms in which it is ordinarily maintained** or in a reasonably usable form or forms; and
 - c. A party need not produce the same electronically stored information in more than one form.

“I submit the Act 235 new e-discovery rules are at best inconsistent with 809.04, if not downright contradictory. Worse, Act 235’s new e-discovery rules have nothing at all to do with the federal rules of e-discovery.

“Now, there were problems with the federal rules of e-discovery created in 2006 because they did give rise to a lot of satellite litigation and excessive sanctions, and that is why the federal rules of e-discovery were amended in 2015. However, as noted by the Litigation Section of the Wisconsin Bar, none of the problems experienced with e-discovery have occurred in Wisconsin. So, why the radical changes to e-discovery in Wisconsin? Well, in part it is due to the fact that Act 235 was in large part created by out of state lobbyists, without input from the Supreme Court or the Judicial Council. Let’s take a look at the e-discovery rules created by Act 235 vis-à-vis other rules of civil procedure or common law rules. There is nothing in the new rules about preservation of evidence or dealing with intent to destroy or Spoliate evidence. There is little flexibility there about how relief can be afforded when it is suspected that a producing party is withholding or hiding electronically stored information (ESI). And most interesting of all, these rules don’t just frustrate discovery by plaintiffs; they apply to everyone, including Wisconsin corporations that find themselves in state court battling other corporations.

“So what are the implications for state litigators, state lawyers and our courts?”

“Let’s take a look at the clawback rules advocated by the Council. When you read our Council Petition which led to the clawback rules, one is first struck by just how carefully the Council has considered the interrelationship between Wisconsin practice and corresponding federal rules. This is typical of how the Council has operated during the past 70 years.

“And by the way, looking at Wis. Stat. Section 905.03 from Westlaw, you can see just how much very useful information is often made available to practitioners and courts by the Judicial Council. In the case of 905.03, the Council information is available for clawback rules created in 2012 and also for amendments made to 905.03 as long ago as 1974.

“So, let’s look at the clawback rules and other tools designed to avoid discovery mishaps in light of the new Act 235 rules. First, the clawback rules (and related rules dealing with discovery mishaps) are not meant to effect plaintiffs at all. The rules designed to avoid discovery mishaps are meant to benefit large corporations or the government when producing large amounts of ESI without benefit of much in the way of review.

“So, what if you’re a large corporation seeking discovery or making disclosures? In terms of discovery, under the new Act 235 rules, if you are dealing with an unscrupulous producing party you may well face efforts to move ESI into storage or move ESI from an area where the ordinary course of business is pursued to an inaccessible location. Even if you are prepared to pay for retrieval, your discovery just became much more difficult because how do you make a showing of substantial need and good cause [as required by 804.01(2)(e)1g] when you don’t have any way to know what is being hidden? Even a well-represented corporation can’t prove what it can’t find out. So, within the meaning of the Document Mishap article, under the new rules created by Act 235 any discovering party, even a large corporation, may find it very difficult to prove a failure to produce relevant ESI or, alternatively, prove a failure to preserve.”

“As for making disclosures, right now you can do that safe in the knowledge that you be able to clawback any privileged information. Just as on the federal level, under 804.01(7) one way to handle clawbacks is by entering into a 502-type agreement. But here is a potential problem.

“If you are seeking a clawback, Wis. Stat. 905.03(5) specifies as follows: “A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply: 1) The disclosure is inadvertent. 2) The holder of the privilege or protection took reasonable steps to prevent disclosure. 3) The holder promptly took reasonable steps to rectify the error...” If you are attempting to resist a clawback, how do you prove that given the restrictions imposed by the new e-discovery rules of Act 235?

“The Council has a lot of work to do. As I noted, The ECP is studying Act 235 to determine: 1) How Act 235 compares to the Federal Rules of Civil Procedure; and 2) what types of actions should be exempt from some or all of the provisions of Act 235 (such as divorce or injunction proceedings). However, just as important, how do the new rules created by Act 235 relate to Wisconsin’s existing Rules of Civil Procedure?

“Because of what I have said just about the new e-discovery rules created by Act 235, I would ask for a motion that the ECP be empowered to also study reconciliation of the new rules created by Act 235 with all relevant existing Rules of Civil Procedure.”

After Gleisner concluded his remarks John Orton observed that it was his opinion that the referral Gleisner was requesting had already been included in the original referral to the ECP. Tom Shriner

agreed with John. As a consequence, Gleisner's presentation was deemed unnecessary and the motion to refer was tabled.

III. New Business.

Judge Fitzpatrick was welcomed back to the Judicial Council and his excellent work concerning Act 235, which he delivered to members of the Judiciary recently, was recognized.

IV. Committee Reports.

1. Evidence & Civil Procedure Subcommittee: Tom Shriner reported that the ECP will continue its study of Act 235 and will endeavor to have a report when the Council returns in January.
2. Criminal Procedure Subcommittee: Judge VanDeHey stated that this committee will continue to study the Expungement/Expunction statute.
3. Appellate Procedure Subcommittee: Professor Wright reported that this committee will be discussing withdrawal of counsel in appellate cases.

VI. Adjournment.

Meeting adjourned at approximately 10:30 a.m.