



STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
November 19, 2021

The Judicial Council met at 9:00 a.m. on November 19, 2021 via Zoom.

MEMBERS PRESENT: Chair William Gleisner; Judge Eugene Gasiorkiewicz; Judge Thomas Hruz; Judge Scott Needham; Judge VanDeHey; Ron Tusler by his Assistant Kathryn; Sarah Barber; Diane Fremgen; Christian Gossett; Margo Kirchner; Dennis Myers; John Orton; Adam Plotkin; Steve Kilpatrick; Margo Kirchner; Tom Shriner; Adam Stevenson; Sarah Zylstra.

EXCUSED ABSENCES: Judge Hannah Dugan; and Senator Wanggaard.

DISTINGUISHED GUESTS: Cale Battles from the State Bar; Wisconsin Eye.

We started the meeting with a discussion of the purpose of the Judicial Council by reviewing the provisions Wis. Stat. §758.13, which reads in pertinent part as follows:

(2) Powers and duties. The council shall (Emphasis supplied):

(a) Observe and study the rules of pleading, practice and procedure, and advise the supreme court as to changes which will, in the council's judgment, simplify procedure and promote a speedy determination of litigation upon its merits.

(b) Survey and study the organization, jurisdiction and methods of administration and operation of all the courts of this state.

(d) Receive, consider and in its discretion investigate suggestions from any source pertaining to the administration of justice and to make recommendations.

(e) Keep advised concerning the decisions of the courts relating to the procedure and practice therein and concerning pending legislation affecting the organization, jurisdiction, operation, procedure and practice of the courts.

(f) Recommend to the legislature any changes in the organization, jurisdiction, operation and methods of conducting the business of the

courts, including statutes governing pleading, practice, procedure and related matters, which can be put into effect only by legislative action.

(g) Recommend to the supreme court, legislature and governor any changes in the organization, operation and methods of conducting the business of the courts that will improve the efficiency and effectiveness of the court system and result in cost savings.

See also Wis. Stat. §751.12(5) (“The judicial council shall act in an advisory capacity to assist the [Supreme Court] in performing its duties under this section”).

Judge Gasiorkiewicz delivered a Report on two recent developments of importance to the Judicial Council. 1) The recently concluded annual meeting of the Wisconsin Judicial Conference. 2) An August 2021 request for comments by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States regarding proposed amendments to a number of Federal Rules.

Judge Gasiorkiewicz began his remarks by noting that the Wisconsin Judicial Conference had unanimously appointed Judge Gasiorkiewicz and Judge Needham to serve another term on the Wisconsin Judicial Council.

Judge Gasiorkiewicz then reported on relevant information he learned from certain sources at the recent Judicial Conference. Gasiorkiewicz stated that there still is a movement, which has lasted for a number of years, to eliminate the Judicial Council. He also reported that we don’t have the best relationship with the Supreme Court. There is still unhappiness with regard to the issues relating to our former staff attorney. And without a staff attorney we lack the ability to be completely compliant with our statutory mandate.

John Orton then asked Judge Gasiorkiewicz if he had gotten any feedback from other members of the Conference as to the work that is being done by the Council. Gasiorkiewicz stated that he had not received any feedback, of any kind.

Judge Gasiorkiewicz then moved on to proposed amendments to the Federal Rules. Gasiorkiewicz began by noting that the responsibilities of the Federal Rules Committee is very similar to what the Council does, but they have a much more robust approach to their work. The Federal Committee does on steroids what we should do for Wisconsin, but the Federal Committee has a number of research resources which we do not have available to us. Some of the proposed rule changes which may be of interest to us include Rule 2 (suspension of rules), Rule 4 (appeal of right), Rule 15 (amended and supplemental pleadings), Rule 72 (Magistrate Pretrial Orders) and new Rule 87 (which is new and provides for civil rules during emergencies). There is also a new criminal procedure rule, Federal Rule 62 (also dealing with rules during emergencies).

With regard to federal rules of evidence, Gasiorkiewicz reported on Rule 106 dealing with related writings or recorded statements (comparable to our rule of completeness

under Wis. Stat. §901.07). The Federal Committee now proposes to extend Rule 106 to include both written and oral statements when an exclusion would create a misimpression. The new Rule 106 would extend completeness to include oral statements despite the existence of hearsay objections. By the way, our Wis. Stat. §901.07 was recently modified to include oral statements (see *State v. Eugenio*), but our amended 901.07 does not waive the hearsay objection. Another changed rule is Rule 615 (excluding witnesses) which is similar to our sequestration rule (Wis. Stat. §906.15(3), which comes from *State v. Copeland*, 2011 WI App 28). The changed Rule 615 would not just allow a Judge to not just exclude a witness from a courtroom but to prevent a witness from obtaining access to testimony via electronic means. In fact, new Federal Rule 615 would also give a trial judge discretion to prevent counsel for a party from divulging witness testimony to a sequestered witness.

According to Gasiorkiewicz, another modified rule is Federal Rule 702 (testimony of an expert witness) which is the basis of our rule in Wis. Stat. 907.02. The Federal Rules Committee is very concerned about a recent shift from considering the underlying criteria of Daubert as criteria for admissibility to matters which a Jury may consider as weight to be given to expert testimony. The changes proposed to Rule 702 would shift the criteria back to the gatekeeping function of the trial judge and thus reinstate the original meaning of the Daubert principle. The Federal Rules Committee believes that an overreliance on old case law (both at the federal level and in Wisconsin) which stated that all testimony including expert testimony should be treated liberally and allowed to reach the Jury. The modifications to Rule 702 is meant to reinforce the Daubert rule as enunciated by the U.S. Supreme Court. There is push back to the reemphasis of Daubert in that opponents claim that over reliance on Daubert violates the Seventh Amendment by transferring fact finding from the Jury to the Trial Judge.

Judge Gasiorkiewicz noted again that comments on the proposed changes to the Federal Rules are due by February of 2022. If ultimately adopted by the full Rules Committee and if not changed by Congress or the Supreme Court, the proposed rule changes would not take effect until December of 2023.

Judge Gasiorkiewicz that brought up several other matters concerning rules that he thought it would be appropriate to put before the Council. Gasiorkiewicz first raised the issue of Federal Rule of Civil Procedure 26(b)(1) which we now know (because of Act 235) as the proportionality rule. First, the Judge noted that Wisconsin is only one of fifteen states that have adopted the proportionality rule as it is expressed in Federal Rule 26(b)(1).

The other matter which Judge Gasiorkiewicz wanted to raise relates to the third party funding of litigation, which has become a 5 Billion Dollar industry. There are a number of concerns regarding this industry, including the need to have disclosure of any such funding. There are other concerns regarding influence and conflicts of interest, not to mention return rates for those who offer such funding. Gasiorkiewicz suggested that

perhaps this all needs to be studied. Wisconsin has addressed this funding in Act 235, which has now been codified in Wis. Stat. §804.01(2)(bg), which provides:

(bg) Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

Judge Gasiorkiewicz thinks the Judicial Council should look at the provisions of Wis. Stat. §804.01(2)(bg) because it is far from clear what “third party agreements” may include. Also, Judge Gasiorkiewicz reads this statute as part of the discovery procedure and traditionally Wisconsin Judges do not receive discovery materials before trial. According to Judge Gasiorkiewicz, there are a number of issues which are raised by Wis. Stat. §804.01(2)(bg). For example, 1) what in the third party agreement has to be disclosed? 2) what provisions within that agreement have to be disclosed? 3) Should it be submitted to the trial judge as well as the parties? 4) Should this be disclosed in open court to juries (an issue already percolating in federal case law)?

As to the last issue, Tom Shriner noted that if the existence of a funding agreement is disclosed in open court, juries are going to find out about it. Tom questioned the wisdom of disclosing this to a jury because after all no one asks the defense to disclose what it is spending for legal fees. But Tom does note that the old rules of champerty and maintenance forbade anybody other than the parties to fund litigation. Judge Gasiorkiewicz agreed that these all are legitimate concerns that need to be studied.

Gleisner asked Judge Gasiorkiewicz how our Wisconsin rules on experts would change if we ultimately adopted the proposed new rules on expert testimony. Judge Gasiorkiewicz stated that the problem is one for federal courts since Wisconsin courts have been by and large properly using the Daubert standards.

Tom Shriner pointed out that an unspoken problem with Federal Rule 702 is its close relationship to Federal Rule 403 (excluding relevant evidence because of prejudice, confusion, waste of time or for other reasons). According to Shriner, the real reason for Daubert was to “keep garbage out.” And this is really the focus of Rule 403. As Shriner pointed out, garbage coming from an expert is a particular problem of importance because juries tend to listen to experts, and thus that is why we have Daubert. Judge Gasiorkiewicz responded that ever since Daubert he will not introduce a witness as an expert to a jury, lest the jury get the idea that the Judge is giving his imprimatur to the expertise of the witness. Tom Shriner also noted that we tend to think of Daubert as applying to civil cases, but in fact Daubert motions are occurring with increasing frequency in criminal trials. Judge Gasiorkiewicz responded that the criminal arena may be the driving force behind the recent proposed changes to Federal Rule 702. Especially with regard to forensic experts, when an expert comes forward and says, for example,

that a finger print is unlike any other finger print in the world, that is not sustainable scientifically.

Gleisner then moved on to item 4 on the agenda as to whether the Council should adopt a different form of communication with the Supreme Court (such as writing letters, instead of only submitting petitions and supporting memoranda). Gleisner asked if we wanted to write a letter to the Supreme Court regarding proposed emergency rules. In response, Judge Gasiorkiewicz pointed to rules being adopted on the federal level that will permit for the suspension of rules in special circumstances and maybe we should consider doing that here. Tom Shriner stated that he believed that the Supreme Court had ample authority to make any rules it wishes under Wis. Stat. §751.12, and so we don't need to add our two cents re emergency rules. Tom Shriner said that he thinks we should tell the Supreme Court when we have something important to say which is distinctive and important.

Gleisner then asked for Committee reports. Tom Shriner stated on behalf of the ECP Committee that it has two matters on its plate right now. First, the ECP is going to try to put to bed the project that we have been working on for a couple of years regarding injunctions. Second, the ECP will take up the "restyling" of our Wisconsin Rules of Evidence. Both items will be addressed following the meeting today.

Judge VanDeHey gave a report from the Criminal Procedure Committee. Judge VanDeHey noted that his Committee was assigned responsibility for studying Zoom and similar remote technologies to handle court proceedings. His committee was selected because of how electronic technologies often impact the Constitutional rights of criminal defendants. There are two proposals on the floor. One is a possible rules petition to the Supreme Court and the other is a legislative proposal. Both are designed to determine how to adopt court proceedings to a Zoom world. One of the things we learned from the recent pandemic is that many of the court proceedings which take place in a court room can be done via Zoom. According to Judge VanDeHey, Wisconsin is way ahead of the curve. This was because of the work of the Director of State Courts. When the pandemic hit, one of the first things the Director did was purchase each Judge a Zoom account. There are thus many courts in Wisconsin without any backlog. The Criminal Procedure Committee will study which of the two proposals merit support by the Committee and ultimately by the Judicial Council and will report back to the Council. Judge VanDeHey thinks we need to update our procedures in order to make permanent many of the improvements made possible by Zoom and similar technologies.

Judge Hruz then gave a report from the Appellate Procedure Committee. According to Judge Hruz, his Committee will continue work on its main project which involves developing appellate procedures for competency proceedings under 971.14. At present, this project has been referred to a subcommittee which is diligently pursuing work on the project.

The meeting concluded at 10:15 a.m.