



STATE OF WISCONSIN – JUDICIAL COUNCIL

AMENDED MINUTES
OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
February 16, 2024

The Judicial Council met at 9:30 a.m. on February 16, 2024 in Room 328NW.

MEMBERS PRESENT: Chair William Gleisner; Justice Brian Hagedorn (by phone); Judge Hannah Dugan; Judge Thomas Hruz; Judge Gasiorkiewicz (by phone); Judge Needham; Judge Kristine Snow; Judge Audrey Skwierawski; Sarah Barber; Ryan Billings; Saveon Grenell (by phone); Professor Lanny Glinberg; Steven Kilpatrick; Margo Kirchner; Rebecca Maki-Wallandar (by phone); Molly McNab; Adam Plotkin; Tom Shriner; Sarah Zylstra; and Senator Van Wanggaard (by phone).

EXCUSED MEMBERS: Representative Ron Tusler.

SPECIAL GUEST: Ron Tusler's representative, Nick Schultz.

Roll Call was taken.

January 19, 2024 Minutes approved.

Chair Gleisner began the meeting by stating again that it is time to reflect on the hard work of our Council Committees, and to do a little housekeeping.

After noting all of the hard work of Judge Hruz's Appellate Procedure Committee, Gleisner stated that Tom Shriner's Evidence and Civil Procedure Committee (ECP) has also accomplished a very great deal. Gleisner stated that it is no doubt that the current efforts to review the Rules of Evidence is a daunting task, and Tom Shriner has done a great job! It due in large part to Shriner's efforts to involve MU Law Professor Blinka and UW Law Professor Schwartz as ad hoc members of the ECP Committee.

Gleisner asked Tom Shriner to first discuss the issue of the Unsworn Declaration Act. According to Shriner, Senator Van Wanggaard's Senate Committee took up the ECP's recommendations regarding unsworn declarations in March of 2023, which approved the ECP's recommendation. The proposal then went over to the Assembly and disappeared.

Thanks to Representative Tusler's assistant, Nick Schultz, the unsworn declaration legislation was taken up by the appropriate Assembly Committee last week and then passed by the Assembly. Shriner stated that the unsworn declaration law is something the Council can take credit for, along with Senator Wanggaard and Representative Tusler who took the lead on getting the new law through the Legislature.

Gleisner also stated that through no fault of Mr. Shriner, another very important project of the ECP Committee has been languishing. Mr. Shriner had the ECP Committee embark a project to improve and update Wisconsin's Injunction law, now contained in Wis. Stat. Ch. 813. That Chapter has become a catchall for all manner of injunctive rules, some of which have little or nothing to do with the injunctions which may face trial lawyers. It was Mr. Shriner's goal to make our Chapter 813 more compact and relevant to trial law by seeking to model our Wisconsin injunction law after the federal rule on injunctions in FRCP 65.

As to the matter raised by Gleisner in the Agenda for this meeting relates to the work the ECP Committee has been doing on revising and updating the rules governing the issuing of injunctions in Wisconsin. This has been important because one of the goals of our work is to create for the first time in Wisconsin rules governing preliminary injunctions and temporary restraining orders. Chapter 813 of the Statutes contains what we have now, "which ain't much." One of the other elements missing from Wisconsin's current law on injunctions is a requirement of notice to the other side before injunctions are issued.

Shriner stated that he has never understood why in the 1970s when the updating of the Civil Rules was under consideration the Council and the then ECP Committee passed over the matter of injunctions. After all, for some time there has been a model of injunction practice available on the federal level under Fed. R. Civ. P. 65, which Shriner said "is pretty good."

However, Shriner said that he did sideline the work on Chapter 813 because an opportunity presented itself to involve Professors Blinka and Schwartz in the revision of the Rules of Evidence. As Shriner noted, it would have been unfortunate to have passed by the opportunity to involve these Professors in such an important project as reviewing the Rules of Evidence. It is important to note that when the work on Ch. 813 was paused, a great deal had been accomplished in the rewriting of injunction law in Wisconsin, thanks to the invaluable assistance of Sarah Walkenhorst Barber, senior staff attorney at the Legislative Reference Bureau. However, while the work on injunction law has not concluded, we were well on our way to revising the injunction rules in Chapter 813.

As Shriner noted, if we had paid staff, we might have been able to work on both the injunction rules and a revision of the Evidence Rules. But without staff, we had to set priorities, and this led us to focus on the Evidence Rules for now. And as Shriner further noted, when it comes to working through the thicket of rules in present Chapter 813, we really need staff to tackle the work.

As Shriner further noted, whenever the ECP Committee revises rules such as the Evidence

Code or injunction rules, the ECP Committee strives to take into careful consideration what the federal system has done to map out similar rules. In so doing, we accomplish two important tasks: 1) We build on the extensive work of the federal system in crafting similar rules; and 2) to the extent we are able model state rules on corresponding federal rules, we make it possible for the Wisconsin Bench and Bar to access the extensive teachings of U.S. Judicial Conference and the Federal Court System.

Judge Gasiorkiewicz then stated that both the Council and the Wisconsin Bench and Bar owe a great deal to Tom Shriner and all the work he has done on the unsworn declaration act. The passage of an unsworn declaration act will help to streamline litigation in a number of different ways which will benefit everyone who does litigation in Wisconsin.

Gleisner also added that no one is to blame for delays in moving forward with matters such as improving our injunction rules. We don't have funding; we don't have staff. It is very difficult, sometimes impossible, to run a ship like the Council without any sailors.

Gleisner continued: "It is nothing short of a miracle that we have been able to keep the Council afloat for six years without funding, a staff, an office, a dedicated phone and email system, etc. We have been operating a State Committee as though it were a band of nomads. That is both unfortunate and a disservice to the Wisconsin Bench and Bar, not to mention and the Citizens of Wisconsin."

Margo Kirchner then asked if it would be a good idea to send a letter to Governor Evers encouraging him to sign the uniform unsworn declaration act into law. Gleisner then consulted with Representative Tusler's assistant, Nick Schultz, who is the Representative's liaison with the Council. Mr. Schultz said that would be a good idea. It was then pointed out that we would need to get a letter to the Governor very quickly. Gleisner volunteered to see that a letter is drafted and circulated to the Council for approval. Once approved, Gleisner would see to it that the letter is sent by the fastest means available.

Sarah agreed that a letter should be sent by Gleisner as Chair, but the letter should contain the names of all the Council members along with an identification of which organization each member represents. Margo Kirchner agreed, and said it is important that we show the Governor that the Council cares.

Judge Snow raised another issue. Assume the Governor signs the unsworn declaration act into law, there are a lot of forms, including CCAP forms, that contain affidavit signature blocks, etc. There is a forms committee that meets quarterly. It would be a good idea to bring the new rule to the attention of that committee. Judge Snow knows the counsel for the Forms Committee, and she will forward the new law to that committee.

Sarah Zylstra pointed out that the new rule does not bar traditional affidavits. It would still be proper to utilize notarized affidavits. The new unsworn declaration act just provides an alternative method of preparing an affidavit. So, it won't be mandatory to change the forms

immediately. This whole issue can wait until another day.

Tom Shriner also encouraged Margo and Sarah to put together an article for some bar publication, which should make it clear how much the Council did to bring the uniform unsworn declaration act to fruition. Sarah said that she and Margo are discussing this. However, because Margo is running for re-election to the Council, Sarah will handle writing such an article, and finding a home for it.

Gleisner then turned to Judge Hruz, noting that he was the other person who received Accolates this morning. Judge Hruz responded that any credit to him is also credit to Christina Plum and to the other members of the Appellate Procedure Committee.

Judge Hruz reported that there are two important things to discuss concerning the work of the Appellate Procedure Committee (APA). First, there is the success the APA has now had on Supreme Court Petition Rule 23-5. This rule will provide guidance when there is a 971.14 order, which is where a defendant has been deemed incompetent to stand trial and an involuntary commitment ensues for treatment and how one deals with medications. On January 25, 2024 there was a hearing before the Supreme Court. The vote to approve was 5 to 2, and so it was approved.

There were 2 Justices who were concerned that about the rule we had adopted, but while there was a dissenting opinion by two Justices re involuntary administration of medication, we will need to await the issuance of a Dissenting Opinion to understand why there was a dissent. Be that as it may, the rule did pass with an effective date of July 1, 2024. The Supreme Court asked about a number of questions about the new act, like what should be its title. The new rule will be placed in a section which deals with specialty appeals and will have a title: "Appeals from Orders entered pursuant to 971.14." Gleisner asked Judge Hruz to circulate the Dissenting Opinion when it is issued. Judge Hruz said that he would distribute the Dissent to the Council once it is issued.

Judge Hruz also provided an update on the project that was assigned to the APA subsequent to receiving Assistant AG Kilpatrick's August 30, 2023 letter regarding the creation of a proposed rule concerning civil appellate venue statute. In 2011 the Legislature modified certain rules regarding cases in which the sole defendant is the State of Wisconsin, or a State Officer, employee, etc. At the Circuit Court level, the venue rule in 801.50(3)(a) provides "Except as provided in pars. (b) and (c), all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law [Emphasis supplied]."

Now, if there is an appeal, the rules currently allow an appeal by a plaintiff to venue an appeal in a District of the Court of Appeals selected by the Plaintiff, except that the District cannot be the one where the trial court action was venued. The DOJ 8/30/23 letter submitted by Assistant AG Kilpatrick seeks to clarify the appellate rule.

While the tape-recorded record of the February 16, 2024 meeting contains further discussion, Gleisner has not included it in these minutes because it is understood that the APA will discuss Assistant Kilpatrick's memo and feedback concerning same in the March 15th meeting. There is another reason Gleisner is not including further discussion about what occurred during the February 16, 2024 meeting.

Judge Dugan also reported that later during the month of February there would be a meeting of the DAR Subcommittee at a time to be designated later.

The business meeting concluded prematurely at 11:00 a.m. on February 16, 2024.

Minutes prepared by Attorney Gleisner