STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
October 19, 2018

The Judicial Council met at 9:35 a.m. in the Assembly Hearing Room, State Capitol, Madison, Wisconsin.

MEMBERS PRESENT: Sarah Walkenhorst Barber(by phone); Diane Fremgen; Judge Eugene A. Gasiorkiewicz; William C. Gleisner; Christian Gossett (by phone); Duane Harlow; Margo Kirchner; Devon Lee;. John R. Orton; Thomas L. Shriner; Judge Robert VanDeHey; Steven Wright; and Judge Jeffrey Wagner (by phone).

MEMBERS EXCUSED: Justice Annette Kingsland Ziegler; Judge Scott Needham; Representative Jim Ott; Senator Van H. Wanggaard; Sherry Coley; Dennis Myers; Ben Pliskie and Sara Ward-Cassidy.

I. Roll Call and approval of the Minutes of September 21, 2018.

Minutes were amended and then approved.

II. Report from Tom Shriner regarding Supreme Court Petition 18-03, which was the subject of a public hearing before the Supreme Court on October 11, 2018.

Tom reported that he and Judge Gasiorkiewicz appeared before the Supreme Court on October 11, 2018 in support of the Petition. Tom reported that the hearing went very well and that the Petition was granted unanimously by the Court.

III. Report from John Orton concerning a recent webinar on Act 235 (a copy of the materials from that webinar will be distributed with this agenda) and a discussion of how Act 235 will affect the Wisconsin Justice System.

John reported on a recent webinar concerning Act 235 which he had attended. John began his report by noting that there was a new rule that if there is a motion to dismiss or for a more definite statement is filed by the Defendant all discovery is stayed for 180 days. Tom Shriner noted that the rule should be read as also permitting discovery upon the disposition of the motion in less than 180 days. And John also noted that a plaintiff could go to Court and ask for the right to take discovery before the 180 days has run.

John said that the problem here is with cases that are filed shortly before the statute of limitations runs. This could lead to a number of problems. The defendant could wait until the 44th day to answer and this might deprive the plaintiff of the ability to correct problems such as impleading someone else who might have liability. According to John, there was concern expressed at the webinar about the possibility that the 180 days could be abused.

John stated that the next major concern at the webinar related to the issue of proportionality in connection with discovery. John made reference to Section 10 of Act 235 which anended 804.01(2)(a).[1] The webinar presenters raised concerns that after spending 20 years figuring out discovery parameters under the old rules we will end up spending 20 more years trying to figure out the scope of discovery under the new rule.

Another concern raised at the webinar related to the additional limitation on discovery contained in 804.01(2)(am),[2] which is in addition to the proportionality standard in 804.01(2)(a). Because of 804.01(2)(am), there is a limitation that mandates that a court **shall** limit discovery if it is determined that discovery is cumulative or duplicative or that the burden or expense of discovery outweighs its likely benefit. The webinar presenters noted that this was an interesting new rule because it is not in the federal rules. There is nothing like this in the federal rules. Another limit that is not included in this new rule is the word "unreasonable." It appears that it is not necessary for discovery to be "unreasonably" cumulative or duplicative before a court may mandate a limit to discovery. John opined that hopefully a reasonable standard would be read into this new rule, but there is nothing in the rule that requires such a standard. Also 804.01(2)(am) is a rule that now talks about the burden or expense of discovery and this will no doubt lead to a good deal of discussion in the courts.

John reported that the webinar presenters then discussed the newAct 235 limits on depositions. There are no exceptions in the 10 deposition limit rule, but the hope is that courts will proceed cautiously especially where there are complex cases requiring more or longer depositions. But there are no exceptions built into the rule. Tom Shriner pointed out that stipulations are still possible and may obviate a good deal of problems in more important cases.

John then said the weibinar presenters next discussed new Act 235 limits to 25 interrogatories. The presenters felt that this was problematic because Wisconsin does not have a corresponding FRCP 26, which mandates initial disclosures. By the way, one of the interesting issues raised by a non-webinar lawyer related to family law cases. In such cases, what set of rules apply to family law litigation which is often on going for many years. Take for example a case where you have

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[1] Act 235 amended 804.01(2)(a) so that it now readis as follows:

Parties may obtain discovery regarding any nonprivileged matter and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not beadmissible in evidence to be discoverable.

[2] Act 235 created new 804.01(2)(am) which now provides:

804.01 **(2)** (am) *Limitations.* Upon the motion of any party, the court shall limit the frequency or extent of discovery if it determines that one of the following applies: 1. The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive. 2. The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

an initial action involving the divorce and then the entire matter is reopened several years later to modify custody or some other matter. How does the limit on interrogatories work? Do you get 25 in the first round and then another 25 each time the case resurfaces over the years? How about a divorce that was started in 2015 and now a new issure arises in 2018 or 2019, what rules apply? The old rules of civil procedure or the rules created by Act 235? Tom Shriner noted that courts are good at addressing the rough edges of rule changes and this will undoubtedly happen here.

John next reported that there is now a limit on how far back you can go when making a request for documents.[3] The webinar presenters thought that this would present problems in certain types of cases, like product liability cases, sexual assault cases, toxic tort cases, construction defect cases, etc. John noted, however, that you can go to court and request permission to go back more than five years and once judges here the facts of a case may well agree to such an expansion. But again, this creates a potential for a problem.

The webinar presenters touched briefly on the discovery of electronically stored information.[4] The webinar presenters opined that there was no federal rule which corresponds to this new rule on electronic discovery. John also noted that there is a tendency to locate some of the rules in unusual locations and that will definitely be something that needs to be corrected so as to keep similar rules together. Tom Shriner noted that many of the unusual aspects of litigation can be anticipated in advance (for example, a case where there will be unusual discovery relating to electronically stored information) and made the subject of discussion early on at scheduling conferences, etc. so that the court is aware of the problem in advance.

John then said the webinar presenters addressed agreements whereby someone will receive compensation from the proceeds of a lawsuit or are sourced from the proceeds of a case, then

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[3] Act 235 created 804.09(2)(a) 3, which provides:

804.09 **(2)** (a) 3. The request shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable time period, not to exceed 5 years prior to the accrual of the cause of action. The limitation in this subdivision does not apply to requests for patient health care records, as defined in s. 146.81 (4), vocational records, educational records, or any other similar records.

[4] Act 235 amended 804.09(2)(b)1 to read as follows:

804.09 **(2)** (b) 1. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request. If objection is made to part of an item or category, the part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party shall state the form or forms it intends to use. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production shall be completed no later than the time for inspection specified in the request or another reasonable time specified in the request or another reasonable time specified in the response.

you must inform the opposition of those agreements.[5] Act 235 does not state when then must be done, nor is there any penalty discussed. Tom Shriner stated that the rule states that disclosure must occur without waiting for a discovery request which suggests that a disclosure must be made as soon as litigation is commenced. The webinar presenters also noted that there was no corresponding federal rule on this subject.

Judge Gasiorkiewicz stated that he is not aware of a similar rule elsewhere. Moreover, he noted that this is usually part of discovery, and he ordinarily does not see discovery. The Judge also raised a question about whether any of the information required by this new rule is admissible in evidence. Judge Gasiorkiewicz stated that he thought the intention was to streamline litigation, but the Judge opined that overall Act 235 is going to mean much more work for the courts. Tom Shriner agreed. John Orton added that he thought that overall Act 235 will expand the expense of litigation, especially in smaller cases. Judge Gasiorkiewicz then asked if 804.12 sanctions apply to some of the new rules that have been created by Act 235, and Tom Shriner said he believed that would be the case.

John then returned to the webinar and stated that the final point they made related to the automatic appeal of class action certifications.[6] But because the webinar was not geared to people who practice class actions so not much was said about this. Tom then discussed the class action modification allowing for automatic appeals and noted that this was not in the rule adopted by the Supreme Court. He also questioned the placement of the new rule in Chapter 803 and stated that it should be located in Chapter 809. Tom Shriner also questioned whether there should be a special method of tracking class action appeals occasioned by the new rule. Diane Fremgen noted that cases are now tracked by class code. Tom suggested that there should be a method for tracking class action mandatory appeals.

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[5] Act 235 created 804.01(2)(e) which provides as follows:

804.01 **(2)** (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.

[6] Act 235 repealed of Supreme Court Order 17-03 and recreated 803.08(11) as follows:

803.08 **(11)** INTERLOCUTORY APPEAL OF CLASS CERTIFICATION. (a) When practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. If the court finds that the action should be maintained as a class action, it shall certify the action accordingly on the basis of a written ecision setting forth all reasons why the action may be maintained and describing all evidence in support of the determination. An order under this subsection may be altered, amended, or withdrawn at any time before the decision on the merits. The court may direct appropriate notice to the class. (b) An appellate court shall hear an appeal of an order granting or denying class action certification, or denying a motion to decertify a class action, if a notice of appeal is filed within 14 days after entry of the order. During the pendency of an appeal under this subsection, all discovery and other proceedings shall be stayed, except that the trial court shall retain sufficient jurisdiction over the case to consider and implement a settlement of the action if a settlement is reached between the parties.

Bill Gleisner then made some general points. He first stated that no doubt the Legislature had the power to adopt Act 235, but its enactment highlights why the Judicial Council is important. The Supreme Court can't really reach out and make changes to rules. It acts in response to petitions, and the source of petitions of interest to the Supreme Court has often been the Judicial Council. Gleisner also noted that the avowed purpose of Act 235 was to federalize Wisconsin's Rules of Civil Procedure. However, the new rules created by Act 235 often don't track with the federal rules and often actually create rules that have no counterpart in the federal rules.

Gleisner then commented specifically on the points made by John during his presentation. His greatest concern relates to the new 180 day stay. This will be very problematic for plaintiffs who commence actions close to the running of a statute of limitation, because it is not possible to extend the 90 day limit in 801.11. Tom Shriner added that 801.11 actually forbids extending that 90 day limit.

IV. Discussion of possible projects for the Council during the upcoming year.

Emphasis was placed on learning what State Bar members have by way of suggestions. It was decided that we should seek to have some type of communication between members of the Council and the State Bar to report on activities of the Council and solicit from Bar members suggestions for future action by the Council. In essence, it was decided that the best way to proceed might be for the State Bar representatives on the Council (Coley, Gleisner, Kirchner and Orton) to prepare monthly reports to the State Bar which would be published in the Wisconsin Lawyer. Gleisner asked State Bar representative Davis to check into the feasibility of doing so.

V. Review of our Budget, which was submitted on behalf of the Council on September 21, 2018. A copy of this Budget as submitted is attached to the proposed September 21st Minutes of the Council.

A brief review of the budget took place, but no action was taken.

VI. Adjournment.

Meeting adjourned at approximately 11 a.m.