STATE OF WISCONSIN – JUDICIAL COUNCIL

MINUTES OF THE MEETING OF THE
WISCONSIN JUDICIAL COUNCIL
MADISON, WISCONSIN
April 16, 2021

The Judicial Council met at 9:00 a.m. on April 16, 2021 via Zoom.

MEMBERS PRESENT: Chair William Gleisner; Judge Eugene Gasiorkiewicz; Judge Thomas Hruz; Judge Scott Needham; Sarah Barber; Christian Gossett; Steven Kilpatrick; Margo Kirchner; Dennis Myers; John Orton; Adam Plotkin; Thomas Shriner; Adam Stevenson; Judge Robert VanDeHey and Sarah Zylstra.

MEMBERS EXCUSED: Judge Hannah Dugan; Representative Ron Tusler; Senator Van Wanggaard; Lynne Davis; and Ben Pliskie.

SPECIAL GUESTS: Lynne Davis (State Bar); Michaela Paukner (Wisconsin Law Journal); Adam Jordahl and Hamilton Consulting.

I. Roll Call and approval of the February 19, 2021 Minutes.

II. An interesting but very important point was raised by Judge Hruz, Chair of the Appellate Practice Committee concerning mixed procedural and substantive issues and asked the Council for its guidance regarding how to determine how to handle such situations.

Judge Hruz provided a report to the Council. According to Judge Hruz, for a few years now, the Appellate Procedure Committee has been studying the gap between Wis. Stat. § 971.14, case law--in particular, *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994) (directing courts on competency proceedings at postconviction and appellate stages), and *State v. Scott*, 2018 WI 74, 914 Wis. 2d 141, 382 N.W.2d 476 (holding that an order for the involuntary treatment of a criminal defendant for the purposes of restoring competency to stand trial is appealable as of right as an appeal from a final order in a special proceeding)--and the absence of procedural rules on how to pursue an appeal of an involuntary treatment order and how to proceed in light of *postconviction* competency problems. The committee initially began looking at drafting rules to codify case law and provide a structure for postconviction & appellate competency proceedings, including the possible structure for an expedited appeal of an involuntary treatment order before trial. To do so, we have added ad hoc members on the committee very familiar with this subject from the DOJ, SPD and DHS. What has become clear is that a number

of draft statutory provisions members of the committee have raised--and even advocated for--are arguably substantive--indeed, some of these issues are currently being actively litigated in Wisconsin courts at this time.

What Judge Hruz is asking from the Council is for direction from the Council at large how best to ensure we remain limited in our work to what is proper and within the Council's charge.

Glienser noted that this is an issue that has come up in the past, but perhaps not so directly as that outlined just now by Judge Hruz. Tom Shriner reviewd the statute, Wis. Stat. 758.13, specifically the powers and duties of the Council in sub. 2.[1] According to Shriner, "as Dean Kearney used to say, drawing the line between procedural and substantive matters is not always easy." According to Shriner, sometimes procedure is substance; sometimes "how you handle something" is all there is. What is due process of law but procedure, but it is a pretty substantive issue.

Shriner had two questions for Judge Hruz. First, do you think you could reach consensus on your committee, given the politics at issue? Second, can you carve somethings out that are obviously procedural. This discussion reminds Shriner of the many years trying to effect criminal justice reform. A lot of tht was procedure, but in the end folks could not agree. Gleisner stated perhaps the first thing to do is take a look at the Wisconsin Supreme Court or Court of Appeals and see if they have given any hint as to whether something is procedural or substantive. At the end of the day, if the committee can't reach consensus, you bring to the Council and a decision is made, referencing the language of Wis. Stat. §758.13 or refer it to the Supreme Court as an undecided issue.

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[1] Wis. Stat. §758.13**(2)** reads as follows:
Powers and duties. The council shall:
(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.

Sarah Zastra stated that when she thinks of such issues it makes her think of diversity actions in federal court. A federal court must apply state substantive law but they also apply federal procedural law.

Judge Hruz said that the problem confronting his committee is really a classic issue. The Judge talked with Jenny Andrews (form staff attorney of the Court of Appeals). They talked about the treatment order and automatic tolling of the treatment order. From that discussion we thought it might be good to avoid taking a position and instead provide a memo that explains the difficulties of reconciling the concerns of the DHS and the DOJ. The attorneys representing the DHS are talking about the pressures involved when someone is waiting the 12 months to see if they return to competence (e.g., where do you house them, in the jail, in the community, etc. And just prepare a memo to the Council concerning the problems and the views of interested parties.

Sarah stated that if, for example, 75% of the committee agreed on procedure but 25% did not, what would be wrong with presenting a petition to the Council with a mJajority and minority report and let the Council make the decision.

Tom Shriner states in response to Judge Hruz that it would be could to look again at §758.13(2). We often focus on §758.13(2)(a).[2] But there are more powers given to the Council under §758.13(2). For example, the Council does have the power under §758.13(2)(f)[3] to make recommendations to the Legislature. Sometimes we default to the Supreme Court because it takes time to get things through the Legislature. The Council has another another power under §758.13(2)(g).[4] All of these powers do provide the Council with some flexibility when faced with issues which are neighter clearly procedural or substantive.

Tom Orton noted that when we finish a topic we often make a decision on whether a particular matter should addressed by petition to the Supreme Court or to the Legislature. In the past, if something is clearly procedural the it should go to the Supreme Court. However, regarding Judge Hruz's issue (where it may be procedural or substantive), we will be insulated from criticism if we present the matter to the Legislature. In a supporting memo to the Legislature you are in the position to point out what is procedural and what may be substantive. Of course, the Legislature has the power to address both substantive and procedural issues.

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[2]**(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.

[3]**(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.

[4]**(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.

Adam Plotkin of SPD observed the following regarding the intent of the work on Judge Hruz's committee. Plotkin noted that there was a sincere effort by SPD to keep any recommendation of the committee within the narrow scope of the Council's power to effect procedural matters. Really the only thing the SPD is focused on procedure only. The matters that are in the Legislature's purview are not the focus of SPD, at least on Judge Hruz's committee.

Gleisner noted that if there is any possibility that substantive issues or issues which may impact Legislative concerns, the Council historically has always opted for going to the Legislature instead of the Supreme Court.

Judge Hruz responded that the discussion today was very helpful to his committee and will enable the committee to go forward with the consideration of Wis. Stat. § 971.14. Judge Hruz noted that there are some brilliant ad hoc people now on his committee and so he is grateful for the input of the Council because it would be a shame not to make use of that ad hoc talent.

No other action was taken on this issue.

III. Justice Dallet raised the issue of Federal Rule 44.1 which governs the interpretation of foreign laws. Justice Dallet asked if the Council could Wisconsin approach. Sarah Zylstra agreed to do research on this topic.

Sarah Zylstra submitted the following report to the Council. Because the *Hennessy* case is now pending before the Supreme Court, the Council will take no action regarding her report while *Hennessy* remains sub judice.

For Discussion - Judicial Council

Proof of Foreign Law

By Sarah Zylstra

History - Federal Courts

Prior to the adoption of Fed. R. Civ. P. 44.1, the federal courts treated foreign law as an issue of fact, not of law. Therefore, the party claiming that a particular foreign law was applicable was required to prove it by offering evidence, which typically was done by offering expert witnesses on the law of the foreign country. Those experts would be subject to examination and cross-examination on the topic as would any expert.

Rule 44.1 took effect in 1966, and it replaced a longstanding common-law tradition of treating the issue of foreign law as an issue of fact. It provides:

Rule 44.1. Determining Foreign Law.

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

The second sentence of the Rule has been the biggest change for proving foreign law. This provision does not prohibit expert testimony about foreign law; rather, it permits the court to consider any relevant material or source on foreign law, including testimony or doing its own research on foreign law, without regard to whether the material considered would be admissible under the Federal Rules of Evidence.

Because the court's determination of foreign law is now a question of law, it is subject to *de novo* review on appeal. *See, e.g.*, *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79, 81 (2d Cir.1994) (reviewing question of foreign law de novo); *Echeverria-Hernandez v. I.N.S.*, 923 F.2d 688, 692 (9th Cir.1991) (reviewing question of international law de novo).

History – Wisconsin Courts

In Wisconsin, unlike Rule 44.1 of the Federal Rules, interpretation of foreign law is a question of fact decided by the trial judge or the jury, not of law. *Griffin v. Mark Travel Corp.*, 2006 WI App 213, ¶4, 296 Wis. 2d 642, 724 N.W.2d 900. While I did not trace the history of Wisconsin's rule, it has been at least this way since 1912. *Hite v. Keene*, 149 Wis. 207, 217, 134 N.W. 383, 386 (1912) ("The question of what a foreign law is, is always a question of fact.").

The primary statute is Wis. Stat. § 902.02, which provides:

> **902.02 Uniform judicial notice of foreign law act.**
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> (1) COURTS TAKE NOTICE. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.
>
> (2) INFORMATION OF THE COURT. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.
>
> (3) DETERMINED BY COURT; RULING REVIEWABLE. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.
>
> (4) EVIDENCE OF FOREIGN LAW. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice

shall be given to the adverse parties either in the pleadings or otherwise.

(5) FOREIGN COUNTRY. The law of a jurisdiction other than those referred to in sub. (1) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

(6) INTERPRETATION. This section shall be so interpreted as to make uniform the law of those states which enact it.

(7) SHORT TITLE. This section may be cited as the Uniform Judicial Notice of Foreign Law Act.

A court may not take judicial notice of a foreign country's law. Sec. 902.02(5) (law of foreign jurisdiction "shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice."). Therefore, because the law of a foreign country is a fact that must be proved, such finding may not be set aside unless it clearly erroneous. *Griffin*, 2006 WI App 213, ¶4. The appellate court does not review the trial court or jury's finding of foreign law under the *de novo* standard of review.

Next Steps

A petition for review has been filed in *Hennessy v. Wells Fargo Bank, N.A.*, 2020 WI App 64, 394 Wis.2d 357, 950 N.W.2d 877. The petition requests that the Wisconsin Supreme Court change Wisconsin's approach to foreign law. Accordingly, I would suggest that the Council wait for and consider that decision before proceeding further.

IV. Committee Reports.

(a) Evidence & Civil Procedure Committee.

Shriner stated as follows. Besides the fact that we are continuing to work through the injunctive rule, Professor Blinka has indeed not retired. And more good news, Professor Blinka is willing to work with the Evidence & Civil Procedure Committee in a new review of evidence rules in Wisconsin. The Professor thinks that various of the federal rules of civil procedure should be "restyled." Regarding the Rules of Evidence, the Professor noted that Wisconsin had adopted the federal rules of evidence back in 1974. The Professor stated that after 47 years Wisconsin should consider restyling our rules of evidence, based what the federal courts have done. The Professor is proposing that the Council consider restyling our Rules of Evidence so that they mirror the restyled federal rules, which restyling was done on the federal level in 2011. Then some very welcome news, Professor Blinka stated that he would be happy to serve as a reporter for the Council's updating of Wisconsin's Evidence Rules.

(b) Criminal Procedure Committee.

There was nothing new to report.

(c) Appellate Procedure Committee.

Judge Hruz had nothing to add to his previous comments.

V. Adjournment.

The meeting was adjourned at 10:15 a.m.