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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2013-14

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on...
Government Operations and State Licensing (AC-GOSL) (Repealed 10-17-13)

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (December 2014)

Supreme Court of Wisconsin

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MADISON, WISCONSIN 53701-1688

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A. John Voelker
Director of State Courts

May 1, 2013

The Honorable Tyler August
Chair, Assembly Committee on Government Operations and State Licensing
Room 317 North, State Capitol
Madison, Wisconsin 53702

RE: Assembly Bill 161, Relating to Injunctions Suspending or Restraining the Enforcement of a Statute

Dear Representative August:

Thank you for the opportunity to comment on Assembly Bill 161. Please accept this written testimony on behalf of the Legislative Committee of the Wisconsin Judicial Conference and on behalf of the court system. The Committee of Chief Judges is still reviewing the specifics of the bill.

Since the bill appears to have some inconsistencies, the Legislative Committee has not taken a position on AB 161. However, the committee does want to raise some questions about the possible interpretations and implications of the bill. I am also supplying explanatory materials about the appellate process in Wisconsin and about the separation of powers doctrine.

Wisconsin amended its Constitution in April 1977 to create an intermediate Court of Appeals and to define the jurisdiction of the Court of Appeals and the Supreme Court.

The constitutional provisions of Article VII, Section 3 provide five methods by which actions may reach the Supreme Court: (1) original action; (2) a writ necessary in aid of its jurisdiction; (3) review of judgments and orders of the Court of Appeals; (4) removal of cases from the Court of Appeals; and (5) certification from the Court of Appeals. Attached is a diagram illustrating those methods; it is called "How a case comes to the Supreme Court." In addition, I have also attached an article from 1985 titled "Discretionary Review by the Wisconsin Supreme Court."

It is unclear to us how the authors of this bill intend for its procedures to modify current methods of reaching the Supreme Court. Some of the questions the Legislative Committee is considering are:

- In what ways will the procedures outlined in AB 161 differ from the methods that already exist?

- How does a "petition for interlocutory review" differ from a Petition for Leave to Appeal or a Petition for Review?

- Does AB 161 maintain the Supreme Court's discretionary review in injunctive matters?

Another question about AB 161 relates to what we believe is an incorrect statement of current law contained in the first sentence of the Legislative Reference Bureau's (LRB) analysis. The analysis says "an interlocutory or final judgment issued by a court in an action for an injunction may not be stayed after the entry of the judgment or during the pendency of an appeal." This statement seems to run counter to the clear terms of Wisconsin Statutes §§ 806.08, 808.07, and 809.12, which seem to authorize the courts to take such action after an appeal has been filed. The Legislative Committee is unsure whether some provisions of AB 161 may be predicated on a misunderstanding of the current authority of the courts.

Provisions within AB 161 raises questions related to the separation of powers doctrine. Since the writing of our original Constitution, there have been books and reams of articles written on this topic. As Nowak, Rotunda and Young wrote in their treatise, *Constitutional Law,* the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."

Wisconsin's legislative service agencies have supplied written information to the Legislature that may help it as it considers proposals that may implicate the separation of powers doctrine. I have attached the LRB "Governing Wisconsin" paper on the doctrine and also a Legislative Council staff memo called "Legislative and Judicial Authority," prepared in 2010 for a Council study committee.

For more extensive analysis, I have also attached two *Wisconsin Lawyer* articles on aspects of the topic, one from 1997 and one from 2004. In addition I have attached a 1989 *Temple Law Review* article that explores in great depth the struggles states have faced in addressing separation of powers issues.

We recognize the challenge faced by this committee and the Legislature as it considers AB 161 in light of the separation of powers doctrine. We hope the information we have provided and the questions we have raised will generate meaningful dialogue on the implications of AB 161 on the judicial process.

If you have any questions, please feel free to contact my office or our legislative liaison, Nancy Rottier.

Very truly yours,

A. John Voelker
Director of State Courts

AJV/NR/lai
Attachments

cc: Members, Assembly Committee on Government Operations and State Licensing
Nancy Rottier

How a case comes to the Wisconsin Supreme Court

WISCONSIN SUPREME COURT: At oral argument, each side is allowed 30 minutes to present its case. Oral argument supplements and clarifies arguments the lawyers have already set forth in written submissions called briefs.

Following each day's oral arguments, the court meets in conference to discuss and take a preliminary vote on the cases argued that day. After the vote, a justice is assigned by lot to write the majority opinion. There are seven justices on the Court.

The Court usually releases opinions for all cases heard during its September through June term by June 30 of that year. Opinions are posted on the court system Web site on the morning of their release (www.wicourts.gov).

The losing party in the Court of Appeals case may ask the Wisconsin Supreme Court to hear the case. This is called a ***Petition for Review***. The Supreme Court receives about 1,000 petitions for review each term, and agrees to hear approximately 100 of these cases. It takes the vote of at least three justices to take a case on a Petition for Review.

THE COURT OF APPEALS is an error-correcting court. It is made up of four districts and 16 judges. The Court of Appeals considers all cases appealed to it and will either:

- review the case, using the transcripts of the circuit court proceedings, sometimes supplemented with oral argument. The Court of Appeals will rule in favor of one party.
- certify the question to the Wisconsin Supreme Court. ***Certification*** means the Court of Appeals, instead of issuing its own ruling, asks the Supreme Court to take the case directly because the Court of Appeals believes the case presents a question of law that belongs before the Supreme Court. It takes a vote of at least four justices to take a case on Certification.

The Wisconsin Supreme Court, on its own motion, can decide to review a matter appealed to the Court of Appeals, ultimately bypassing the Court of Appeals. This is called ***Direct Review***. It takes a vote of at least four justices to take a case on Direct Review.

The losing party may file a ***Petition to Bypass***, asking the Wisconsin Supreme Court to take the case directly, bypassing the Court of Appeals. It takes a vote of at least four justices to take a case on Petition by Bypass.

The losing party may ***appeal*** the decision to the Court of Appeals.

An individual, group, corporation, or government entity may bring a civil case, and the government may commence a criminal case, in the **CIRCUIT COURT**. After the proceedings, the circuit court will rule in favor of one party. There are 249 circuit courts in Wisconsin.

An individual or government entity may ask the Wisconsin Supreme Court to take ***Original Action*** in a case. This means that the case has not been heard by any other court. Because the Supreme Court is not a fact-finding tribunal, both parties in the case must agree on the facts.

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(updated Sept. 2010)

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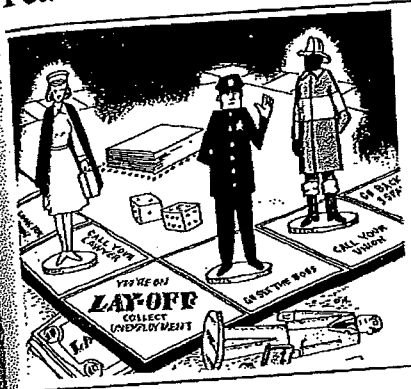

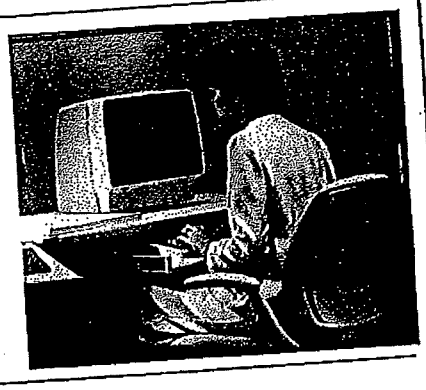

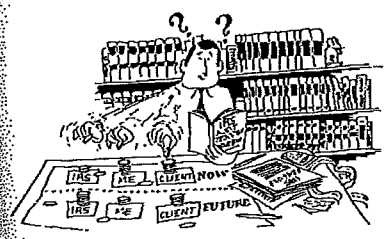

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Discretionary review by the Wisconsin Supreme Court

By Joseph M. Wilson and Gregory S. Pokrass

Since court reorganization in 1978, the Supreme Court of Wisconsin has been without any mandatory appellate jurisdiction. Pursuant to §808.10, Stats., its jurisdiction is exclusively discretionary. Thus a party seeking court consideration of its case must either, petition for review of the court of appeals decision or petition for bypass while the matter is still pending in the lower court.

This article highlights particular problem areas in the above processes and describes the court's procedures for handling these petitions. It is hoped that such focus will assist the bar in its practice before the court and thereby aid in the administration of justice. The basic mechanics of the petitioning process and certain specialized procedures such as certification and orginal actions will not be addressed. In addition to the statutes themselves, other sources have adequately covered these areas. *See, e.g.*, R. Martineau & R. Malmgren, *Wisconsin Appellate Practice* (1978).

Jurisdictional and procedural requirements for petitions for review

Several recent cases have discussed some of the more important jurisdictional and procedural requirements for petitions for review. Litigants or attorneys considering filing a petition for review should be aware of the following cases and rules.

Timeliness of filing and service

The court in *First Wis. Nat. Bank of Madison v. Nicholaou*, 87 Wis.2d 360, 274 N.W.2d 704 (1979), clearly signaled that the 30-day time limit of §808.10 within which a petition for review must be filed would be strictly enforced. If a petition for review is not filed within 30 days of the court of appeals' decision, the court lacks subject matter jurisdiction and the petition must be dismissed. This 30-day period cannot be enlarged under §809.82(2), nor is it extended by §801.15(5) due to mailing of either the court of appeals decision or the petition for review.

In *Gunderson v. State*, 106 Wis.2d 611, 318 N.W.2d 779 (1982), the court reiterated its conclusion that the filing of a petition does not occur upon its mailing. In order for a petition for review to be timely, it must be actually received in the clerk's office within 30 days of the court of appeals decision. The fact that such petition was mailed within 30 days and first received by another governmental office is irrelevant; the potential vagaries in mail delivery are the responsibility of the petitioning party if the mail is chosen as the means of transmittal.

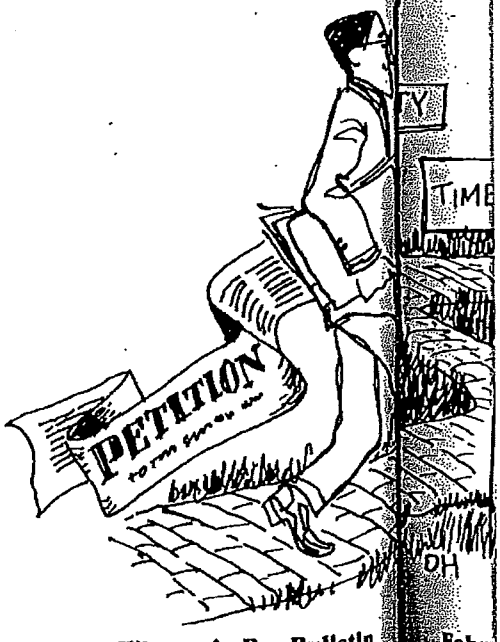
However, in *State v. Rhone*, 94 Wis.2d 682, 288 N.W.2d 862 (1980), the court decided that it had jurisdiction to consider a petition for review even though the petition was served after it was filed and such service, but not the filing, occurred more than 30 days after the court of appeals decision. The court pointed out that even though it had jurisdiction, the opposing party could nonetheless move to dismiss the petition or move for other relief under §809.83(2) on the ground of improper of untimely service. Thus, the prudent petitioner will make sure that the petition is not only timely filed, but also timely served.

Reviewability and finality

In *Neely v. State*, 89 Wis.2d 755, 279 N.W.2d 225 (1979), the court held that a party may only seek review of an adverse decision of the court of appeals. It is the decision, not the opinion, of the court of appeals that is reviewable by the supreme court pursuant to §808.10. A party who is successful in the court of appeals may not seek review in the supreme court even though that party disagrees with the rationale expressed in the opinion.

Furthermore, the subject of the petition for review must be the final decision of the court of appeals. *In Interest of A.R.*, 85 Wis.2d 444, 270 N.W.2d 581 (1978). Generally, an order if the court of appeals disposing of a motion filed in that court cannot be the subject of a petition for review unless such order finally disposes of the case. Accordingly, an order by the court of appeals denying or granting a petition for permissive appeal under §808.03(2) is not reviewable in the supreme court. *State v. Whitty*, 86 Wis.2d 380, 272 N.W.2d 842 (1978). Moreover, on review of the court of appeals' decision in a case in which permissive appeal has been granted, the supreme court will consider only the merits — not the court of appeals' discretion — in granting the permissive appeal. *Aparchor v. DILHR*, 97 Wis.2d 399, 293 N.W.2d 545 (1980).

In the past the court often has expressed the rule that a litigant cannot raise new issues for the first time on supreme court review or appeal. *See Goranson v. DILHR*, 94 Wis.2d 537, 289 N.W.2d 270, (1980); *State v. Killory*, 73 Wis.2d 400, 243 N.W.2d 475 (1976). This rule was usually applied in the context of excusing the court from deciding issues which had not been raised or considered in the trial court or court of appeals. *See Martin v. Liberty Mut. Fire Ins. Co.*, 97 Wis.2d 127, 293 N.W.2d 168 (1980). Recently a variation of this rule has been codified in §809.62(6); if a petition for review has been granted, the petitioner may not raise or argue issues on review that were not set



forth in the petition for review. The court, of course, in granting petitions for review may specify or limit the issues to be considered; however, if the court does not do so, the issues identified in the petition will control. Accordingly, it is the wise petitioner who is as specific and inclusive as possible in the petition for review.

Format of the petition

The court's recent amendments to §809.62(2) also have specified the proper format petitions for review must follow. The petitions are now more formalized with a statement of issues, table of contents, statement of criteria relied upon, statement of the case, argument and appendix required in each petition. Petitions and responses are also now limited to 35 pages in length, not including the appendix. However, it should be the rare petition which reaches that length.

The criteria for review

The criteria for evaluating petitions for review have been recently codified in §809.62(1) pursuant to Supreme Court Order of Oct. 30, 1981, effective Jan. 1, 1982:

"Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

"(a) A real and significant question of federal or state constitutional law is presented.

"(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

"(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

"1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

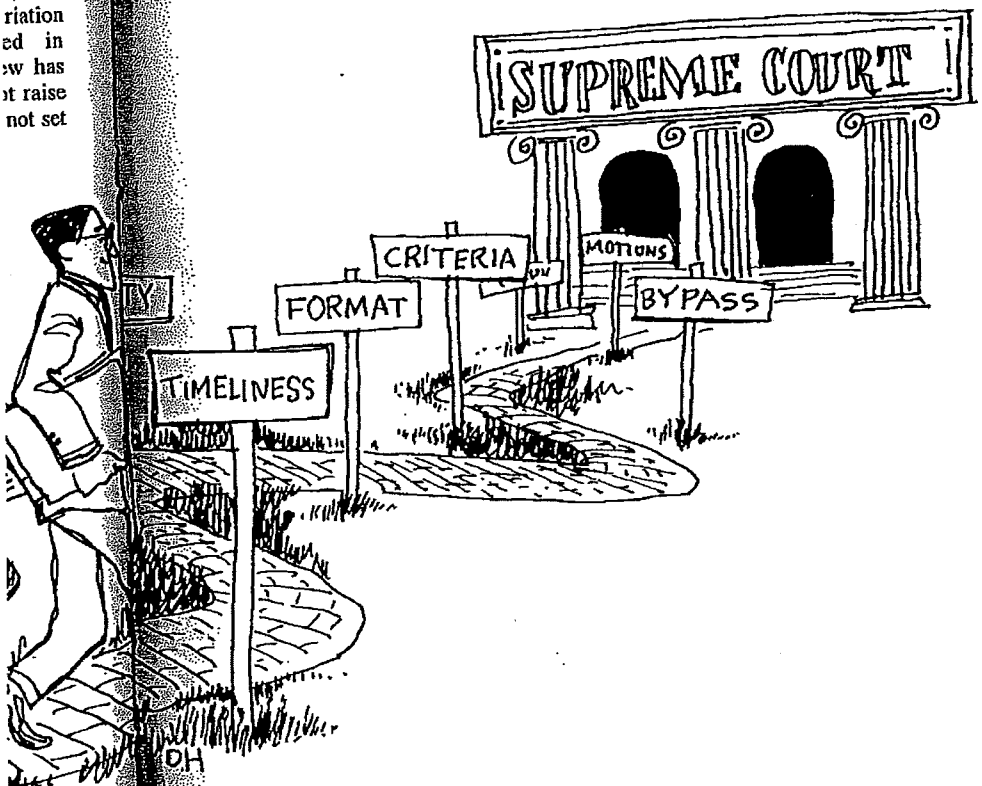
"2. The question presented is a novel one, the resolution of which will have statewide impact; or

"3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

"(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

"(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination."

As the statute itself emphasizes, cases which may or may not satisfy those criteria may nonetheless be granted or denied depending upon numerous undefinable factors which may exist in any given case. The criteria are neither controlling nor limiting measures of the court's discretion; they are simply guidelines. In the final analysis, the court's discretion controls its calendar. Yet, certain general principles should be kept in mind by counsel to aid them in evaluating their cases and presenting meaningful arguments to the court.



Non-codified criteria

Several recent court pronouncements concerning its functions *vis-a-vis* discretionary review should be noted.

In *State v. Mosley*, 102 Wis.2d 636, 665-66, 307 N.W.2d 200 (1981), the court emphasized that its primary purpose is not to correct error in trial court proceedings, a function now largely met by the court of appeals. Rather, the court intends to oversee and implement the statewide development of the law.

In accordance, *Winkie, Inc. v. Heritage Bank*, 99 Wis.2d 616, 299 N.W.2d 829 (1981), stated that the court ordinarily does not take a case on review which involves merely the question of sufficiency of the evidence.

Similarly, in *Hagenkord v. State*, 100 Wis.2d 452, 302 N.W.2d 421 (1981), the court indicated it typically does not review a court of appeals' decision affirming or reversing a trial court's finding on an evidentiary matter; basic to court reorganization is the philosophy that the court of appeals decisions on questions of evidence are usually final.

Finally, in *State v. Outlaw*, 108 Wis.2d 112, 321 N.W.2d 145 (1982), the court indicated it ordinarily does not review a court of appeals' decision in a criminal case where only a question of the proper exercise of trial court discretion is involved. This principle would be similarly applicable in civil situations.

Criteria for petitions to bypass

Neither the appellate practice statutes nor decisions of the court have specified the appropriate criteria for evaluating a petition to bypass. However, past practice of the court has indicated that a matter that is appropriate for bypass is usually one which contains issues that meet one or more of the criteria for normal review assuming a court of appeals' decision had been issued. In this respect, the court may feel that it will ultimately want to consider the case regardless of how the court of appeals may decide the issues. A further factor which is present in some, but not necessarily all, successful petitions to bypass is a clear need to expedite the appellate procedure. An example of such a situation might be a case concerning adoption.

Relationship between issues and criteria

The petitioner's arguments should not stress the merits of the issues raised in the

case. Rather, the petition should primarily address why the court should grant review. The merits of the case should be discussed only to the limited extent necessary to urge the court to grant review.

Many litigants also fail to show precisely how the issues for which review is sought satisfy one or more of the criteria. Counsel often parrot the criteria and blankety submit that they are met. Litigants would be well advised to focus on the aspects of their case that may or may not justify review. The ultimate disposition of the issue, once granted, can thereupon be the focus of the subsequent briefs.

References to court of appeals' briefing

In keeping with the above, petitions should not be carbon copies of the lower court briefing. The necessity to tailor the arguments to the specific purpose of granting or denying review should be kept in mind.

Similarly, portions of previous appellate briefs should not be incorporated by reference into the petitions or responses on the assumption the justices or commissioners will retrieve and review those documents. Although that may occur, prior briefs are not normally part of the appellate record. Litigants are best advised to include in their petitions and responses any specific arguments made to a lower court that are deemed important. If it is necessary to review the entire brief, a copy should be attached to the petition or response.

Motions before the court

Motion practice before the court is regulated by statute. Pursuant to §809.14(1), the motion should state the order or relief sought and the grounds upon which it is based. It may be accompanied by a memorandum.

A party may file a response within seven days of service of the motion. However, pursuant to §809.14(2) a procedural order, such as motions for an extension of time to file a brief, may be acted upon without a response. The statutes do provide for the respondent in such a situation to move for reconsideration of the order within seven days of its receipt.

If the motion seeks an order which may affect the disposition of the case or context of the record or a brief, the time for performing any act required by the rules is automatically enlarged for a period coextensive with the time between the filing of the motion and its disposition. §809.14(3).

Various aspects of certain motions should be understood by litigants.

Extensions of time

Pursuant to §809.82(2), the court upon motion may extend various time limitations. The accompanying Judicial Council Committee Note stresses that such extensions will not be granted merely because the attorneys have so stipulated. In general, requests for extensions are not looked upon with favor by the court.

Relief pending appeal

Pursuant to §809.12, a person seeking relief such as a stay should initially address that request to the trial court. Such a request may be initially made to the supreme court, assuming the case has been accepted, but only if it is impractical to initially seek relief below. The motion to the court should show why it was impractical or, if the motion was actually first filed in the trial court, the reasons given by that court for its negative response.

Summary disposition

Pursuant to §809.21, the court will entertain a motion for summary disposition of a case upon which review has been granted. However, it is obvious that if the court has chosen to review the case, and summary disposition has not been part of the order granting review, the court probably believes the case warrants completion of the full appellate process.

Reconsideration

In *Archdiocese of Milwaukee v. City of Milwaukee*, 91 Wis.2d 625, 284 N.W.2d 29 (1979), the court held that an order denying a petition to review a decision of the court of appeals is neither a judgment nor an opinion and thus there is no statutory authority for reconsideration. Accordingly, as was the result in that matter, such motions are normally dismissed. A limited exception to this principle was enunciated in *Gunderson v. State*, 106 Wis.2d 611, 318 N.W.2d 779 (1982), which indicated that dismissal of a petition for review (which would typically occur when the court has determined it is without jurisdiction, perhaps because the petition is untimely) constitutes a judgment or opinion by the court that it is without jurisdiction in the case. Such a determination is subject to reconsideration to correct possible errors in calculation of time, etc.

Pursuant to §809.64, a party may seek reconsideration of an actual judgment or opinion of the court by filing a motion within 20 days of the decision's filing date.

Court consideration of petitions

All petitions to review and bypass with accompanying responses, and all motions are first submitted on a rotating, random basis to one of three supreme court commissioners. The commissioners review the submitted materials and evaluate the case in light of the rules and criteria for review. A written memorandum usually varying in length from four to ten pages is prepared which generally summarizes the facts, the issues and arguments. Most important, however, it contains an analysis of the nature of the case and a recommendation on disposition of petition, along with a proposed order.

The written memoranda are submitted to the justices along with copies of the material submitted by the parties. Approximately three times per month, the court meets in closed conference to discuss, among other matters, the pending petitions. Each commissioner is present when his cases are considered in order to summarize the matter for the court and answer any questions that may exist. The court, unlike the courts in other states and the U.S. Supreme Court, specifically discusses each petition filed.

The court then votes on disposition of the petition. By Article VII, Section 4, of the Wisconsin Constitution a quorum of four is necessary to conduct the business of the court. Pursuant to court practice, three affirmative votes are necessary to grant a petition for review, regardless of whether some justices may be absent from the conference (although the court usually will delay final disposition of the petition if a missing justice's vote would be outcome determinative). This is patterned after the U. S. Supreme Court practice permitting four of the nine justices to grant certiorari. Four votes are necessary to grant a bypass on the theory that a majority of the court should be required to remove a case from the normal appellate process. Those cases granted are usually scheduled for oral argument. A limited number are submitted on briefs alone for various reasons such as the pendency of a prior accepted case presenting a similar issue.

On a purely statistical basis for the first nine months of 1982, approximately 20 percent of the petitions for review and bypass were granted. Denial, therefore, served to exhaust all state remedies for a vast majority of petitioners. For this reason the supreme court views consideration of the petitions as one of its most important functions and devotes considerable attention to this task.

About the authors

Joseph M. Wilson of Madison received his undergraduate and legal education from the University of Wisconsin, where he was a member of the Order of the Coif and law review. After graduation in 1969, he served as a law clerk for then Justice Horace W. Wilkie of the Wisconsin Supreme Court. From 1970 to 1972 he was an assistant district attorney in Milwaukee County. Since 1972 he has been a Wisconsin Supreme Court commissioner.

Gregory S. Pokrass of Brookfield is a 1971 Carroll College and 1975 University of Wisconsin Law School graduate, where he served as managing editor of the *Wisconsin Law Review*. Appointed a Wisconsin Supreme Court commissioner in 1981, he previously was in private practice with Quarles & Brady of Milwaukee.

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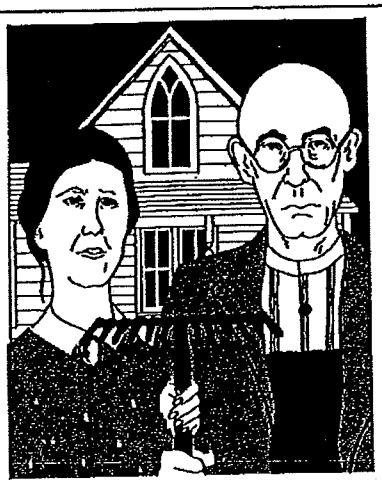
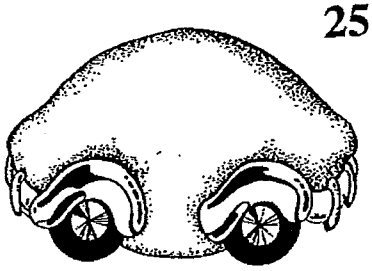
Features





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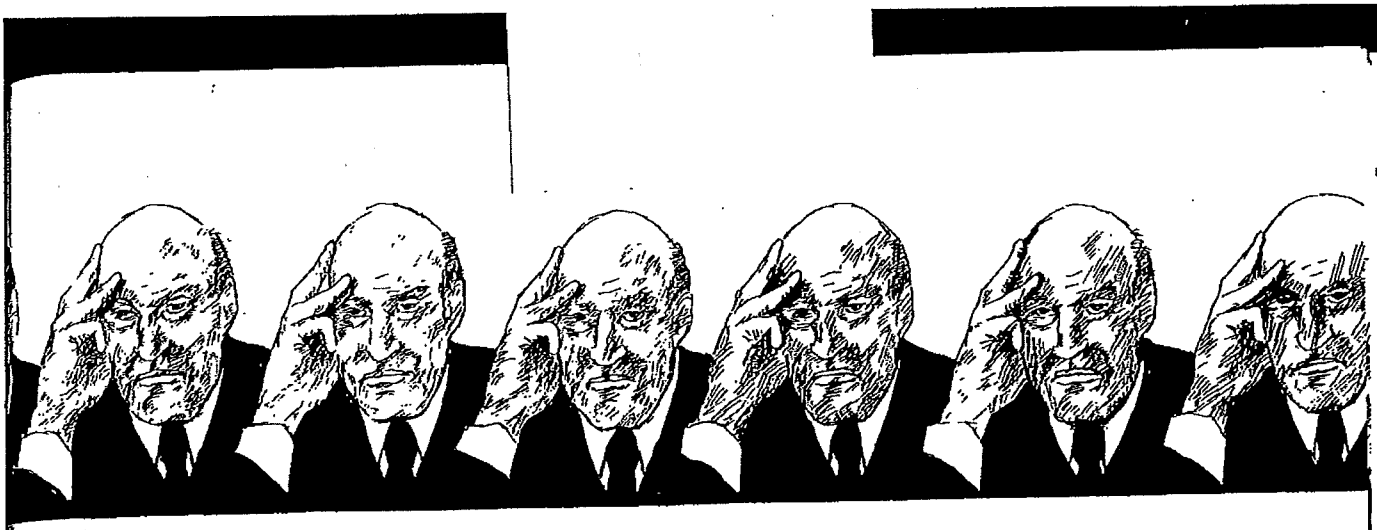


An update

Discretionary review by the Wisconsin Supreme Court

By Gregory S. Pokrass

"Discretionary Review by the Wisconsin Supreme Court," published in the February 1983 issue of the *Wisconsin Bar Bulletin*, discussed the substance and procedure of the discretionary review practice before the court that had developed since the 1978 court reorganization. The subsequent two years have seen further decisions by the court in this area, as well as other related aspects of the Supreme Court process.

This article updates the bar on these recent developments. As with the previous article, it is hoped that such focus will assist the bar in its practice before the court and thereby aid in the administration of justice.

Certifications

Pursuant to sec. 809.61, Stats., the court may take jurisdiction of an appeal or other proceeding in the court of appeals on its own motion or upon certification from the lower court.

As predicted in R. Martineau and R. Malmgren, *Wisconsin Appellate Practice* sec. 3502 (1978), the court has limited means of knowing what is pending in the lower courts and therefore it is unlikely to take jurisdiction on its own motion. This power was exercised in *Wisconsin Bankers Association v. Mutual Savings & Loan Association*, 103 Wis.2d 184, 307 N.W.2d 180 (1981), an unusual situation in which the court was well aware of the pendency of the case, having previously issued a decision remanding and subsequently received a motion for temporary relief. Normally, the court will rely on the parties to petition to bypass or the court appeals itself to certify the matter.

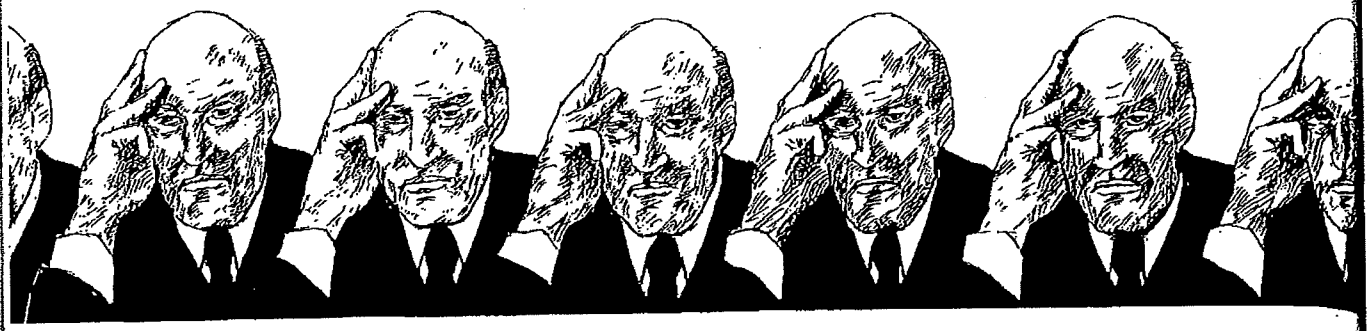
The necessity for litigants to carefully evaluate and prepare their case cannot be overemphasized.

As for certification by the lower court, the Supreme Court has never formally established criteria for acceptance of such a request. Martineau and Malmgren speculated the court would do so if the issues involved in the case were "very controversial" or if the court of appeals was bound by precedent with which it disagreed. Neither has developed as the primary reason for certification.

Most cases certified involve issues which the court of appeals believes already satisfy the criteria for petitions for review specified in sec. 809.62(1). Typically, the issue will be novel, of statewide impact and subject to recurrence, all of which suggest the law development function of the Supreme Court will eventually be called into play and an interim decision by the court of appeals will delay final resolution and be of limited value.

However, even cases that appear upon certification to satisfy the criteria for review may still be rejected at this stage. The case may involve multiple issues, only one of which satisfies the criteria. In such instances, the Supreme Court may want the case to remain with the court of appeals so the other, more routine questions might first be resolved. Thereafter, upon a petition for review, the Supreme Court may then focus on the key issue the case presents. Additionally, the court may believe that an interim appellate opinion from the court of appeals would be useful for the ultimate, final resolution of the matter.

Insofar as the court of appeals might occasionally certify a case because it disagrees with existing precedent, the Supreme Court has issued one published caveat. *State v. Shillcutt*, 119 Wis.2d 7888, 350 N.W.2d 686 (1984), was heard on petition for review but had been previously the subject of a denied certification. The court of appeals, at 116 Wis.2d 227, 341 N.W.2d 716 (1983), concluded that the certification denial reinforced its interpretation on a particular point of law as expressed in the certification request. The Supreme Court emphasized in its opinion that a certification denial carries no implication of approval or agreement. The denial means nothing more than unusual circumstances are not present to require immediate review of the case at the Supreme Court level. Thus it is improper to infer anything from a certification denial regarding the merits of the case.



Petition to bypass

Although no published criteria for bypasses exist, successful petitions typically present issues that meet the criteria for review under sec. 809.62(1) and present some need to expedite the matter.

The court has recently indicated one circumstance under which a petition to bypass will not be considered. *In Interest of J.S.R.*, 111 Wis.2d 261, 330 N.W.2d 211 (1983), presented the court with an attempted bypass on a determination of whether leave to appeal a nonfinal order should be granted. Because the court does not review the exercise of the court of appeals' discretion on nonfinal orders, it ruled it equally would be inappropriate to permit litigants to bypass the court of appeals altogether on this determination. The only theoretical exception would be if the court of appeals itself would certify the issue of whether to permit an appeal, or if the Supreme Court brought the matter up on its own motion, the latter being an unlikely possibility as noted above.

Petitions for review

As explained in the 1983 article, in addition to the criteria for review specified in sec. 809.62(1), non-codified criteria have also been promulgated since the establishment of discretionary jurisdiction.

Several recent decisions have added to the existing law in this regard.

Mootness

The Supreme Court has often indicated a reluctance to decide moot issues, even when it functioned as the only appeals court in the state and had mandatory appellate jurisdiction. This principle has carried over into the discretionary review process.

In *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis.2d 220, 340 N.W.2d 460 (1983), the court suggested that under normal circumstances it would not accept an issue for review that had no practical effect upon the outcome of the case. However, the case recognized that the standard exceptions to deciding moot issues would also control for determining whether the petition for review should be granted initially. Hence, issues of great public importance, involving the constitutionality of a statute, arising so frequently that a definitive decision is essential, or capable of repetition yet evading review, will possibly be considered for review even though moot.

La Crosse Tribune presented a classic example of the exception. An important point concerning closed *voir dire* was taken although the underlying dispute had already been tried. This important issue was capable of repetition and yet tended to evade the normal review process.

Interest of justice

Many petitions for review state as an all-encompassing final issue—and occasionally as the sole question—whether justice was done in that particular case. The Supreme Court clearly retains the power under sec. 751.06, as does the court of appeals under sec. 752.35, to discretionally reverse if justice has miscarried regardless of possible waiver.

However, in *State v. McConnohie*, 113 Wis.2d 362, 334 N.W.2d 903 (1983), the court stressed that ordinarily the question of whether justice has been done in an individual case is primarily, and at least initially, the concern of the court of appeals. Being a discretionary determination, the Supreme Court will tend to avoid "interest of justice" issues in the absence at the very least of an apparent possible error of law.

Of course, litigants should remain aware of the classic admonition in *Mentek v. State*, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976), regarding all-encompassing but nonspecific miscarriage of justice contentions. Adding together previous, non-meritorious arguments under that guise, where the totality of the circumstances does not strongly suggest justice has been denied, is rarely successful because "zero plus zero equals zero."

Attorney misconduct

In *Radlein v. Industrial Fire & Casualty Insurance Co.*, 117 Wis.2d 605, 345 N.W.2d 874 (1984), the Supreme Court reviewed the issue of whether counsel had commenced a frivolous action justifying the award of reasonable attorneys fees. In the abstract, such an issue might typically have not warranted consideration by the court because it involved only the application of well-settled principles to a particular factual situation. Section 809.62(1)(c)1 indicates this is usually not an adequate ground for review. However, the court explained that the onus placed upon the attorney by the lower court's finding of bad faith led it to consider the question.

While *Radlein* does not bind the court to accept such an issue for further review in all instances, it is an indication that the court will particularly scrutinize such matters as part of the process of deciding whether to grant further review.

Radlein also functions as a good example of the court's power to exercise its discretion to hear a case even though it may not precisely satisfy any of the codi-

About the author

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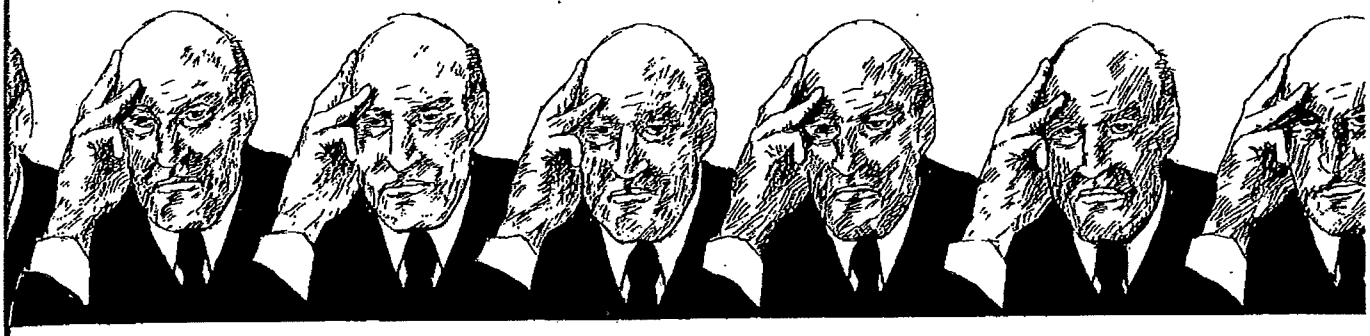

fied criteria for review.

Pro se prisoner petitions

bin-Rilla v. Israel, 113 Wis.2d 514, 335N.W.2d 384 (1983), concerned a petition for a writ of *habeas corpus* that had been denied by the court of appeals because it did not properly challenge the illegality of the commitment. The Supreme Court stressed that at any level in this state's judicial system a prisoner's *pro se* request must be liberally construed to determine if it presents a situation justifying relief. Because *pro se* petitions are often difficult to decipher, flexibility in considering these requests is essential.

This principle is operative in the petition for review process as well. For example, a prisoner's *pro se* request may be in the form of a petition for review where technically a petition for a writ of supervisory jurisdiction under sec. 809.71 would be appropriate. The Supreme Court will usually disregard the technical error and will consider the substance of the petition.

Opinion and decision reconsideration

Section 809.64 states that a motion for reconsideration of a Supreme Court opinion or decision should be brought within 20 days of the filing of the decision. Confusion over the interpretation of this time requirement led to *Lobermeier v. General Telephone Co.*, 120 Wis.2d 419, 355 N.W.2d 531 (1984).

The decision indicated that while the 20-day requirement is not jurisdictional in nature, the motion must still be physically received by the clerk of the court within the 20 days or be dismissed as untimely. Mailing the motion within that period alone is not sufficient. The court did indicate that an extension of this period could be granted prior to remittitur under sec. 809.82(2) but that a request for such an extension would not be looked upon with favor and would be granted only in an unusual situation.

Lobermeier also reaffirmed that successive motions for reconsideration would not be permitted. An exception exists where the second motion is limited to a procedural issue raised by the first motion for reconsideration.

Conclusion

The Supreme Court continues to view the selection of cases to accept on certification, bypass, and review as one of its most important functions, particularly since in many instances a denial ends the litigation. The necessity for litigants to carefully evaluate and prepare their case cannot be overemphasized. Consideration of the court's continuing pronouncements on the entire discretionary review and subsequent appellate process will greatly aid attorneys in this key aspect of their practice. ▲

Governing Wisconsin

From the Wisconsin Legislative Reference Bureau

The "Separation of Powers" Doctrine: Why Do We Separate the Powers of Government?

The Wisconsin Constitution, like most state constitutions, divides the state government's powers into three separate and independent branches. Such a division ensures that no central authority will become too powerful and endanger the liberties of the people. The three branches are the legislative, executive, and judicial. Although they are separate and independent, they must cooperate with each other to run state government.

The three-branch scheme copies the structure of national government, which the original framers of the U.S. Constitution adopted following the American Revolution. They wanted to avoid the concentration of power that was held by the English monarchy at that time, which they believed led to tyranny. So they provided for three branches that assume the three basic functions of government. The framers of the constitution further divided power by giving exclusive powers to the federal government and to the states. State governments also adopted the three-branch model.

Separation does not necessarily mean that the three branches have equal or balanced power. Governmental power comes from the people, who do not entrust it to a single entity. Separating governmental powers diffuses political authority and makes the operation of government in the U.S. more cumbersome. The three branches of government are designed to compete against one another in the formulation of public policy and thereby strengthen our democracy. This is in stark contrast to the governmental structure in many other liberal democracies in which members of the majority political party in the legislature or parliament assume cabinet positions in the executive branch.

Like the U.S. Constitution, the Wisconsin Constitution does not explicitly require separation, but it does grant the powers of government to separate branches. The Wisconsin Supreme Court has held that each branch has an "exclusive zone" of core powers, and that the branches share certain other powers. For example, the judicial and the executive branches share the power to revoke the probation of a convicted felon. Wisconsin's supreme court has taken a fairly permissive attitude toward sharing of power, so the various branches overlap more in Wisconsin than in most other states.

Legislative powers are further divided into a bicameral system, and the governor's powers are similarly limited by the existence of several constitutional officers in the executive branch.

LRB

Legislative Powers

Two houses make up the legislative branch: the senate (with 33 members) and the assembly (with 99 members). Laws must pass both houses in identical form. This branch makes the law, passes the state budget, determines the tax structure of the state, and audits the other branches of government. These legislative actions set the public policy of the state. The legislature possesses plenary power, meaning the constitution does not grant specific powers to the legislature. It has all powers of government not assigned to another branch or prohibited by the federal Constitution.

Only the legislature may judge the qualifications of its members, so the courts cannot determine whether a person qualifies to serve as a legislator. The legislature also has exclusive authority to determine its rules of procedure.

The legislature has powers that serve as checks on the other branches. It can override a governor's veto; it has the power to impeach civil officers from any branch of government; it establishes the lower courts; and it can originate an amendment to the constitution. Certain governor's appointments must have the consent of the senate.

Executive Powers

The executive branch has the power and duty to administer, implement, execute, and enforce the law. The governor serves as the head of the executive branch and as commander in chief of the state military and naval forces. The executive branch includes most state agencies. The Wisconsin Constitution creates administrative officers, such as the attorney general, the treasurer, the superintendent of public instruction, and the secretary of state, who independently exercise some of the executive powers.

The governor also has powers that check the other branches. The legislature must present each bill that it passes to the governor, who can veto acts of the legislature and may call the legislature into special session. Wisconsin's governor has the strongest veto power in the U.S. The governor cannot dissolve a legislature or a legislative session. The governor can fill vacancies in judicial offices and may pardon persons convicted of a crime.

Judicial Powers

The third branch of government, the judicial branch, includes the state supreme court, the court of appeals, and all other courts. The seven-member supreme court controls the other courts, makes procedural rules for the courts, and hears final appeals. The courts determine how the law applies to a particular set of facts. Trial courts determine what evidence may be used to reach a decision and make findings of fact. Courts interpret the law and the constitution in actual cases or controversies, and make binding orders.

Courts fashion remedies—both awards of money damages and injunctive relief—for rights that have been curtailed. Courts have inherent authority to incarcerate any person who disobeys a lawful court order. The judiciary can moderate the powers of the other branches. It can declare that acts of the legislature (statutes) violate the constitution, and it can rule that the executive branch has broken the law.

Shared Powers

In Wisconsin, two or more branches of government share certain powers.

Legislative-executive overlap. State agencies may issue rules or regulations, but this is not a legislative function if the rules merely describe how statutes will be interpreted by an executive branch agency. The governor has a distinct role in the legislative process. He or she may propose bills and veto legislation. The main bill that the governor proposes is the state budget bill.

The legislature has the power to review proposed administrative rules. This function would be considered a violation of the separation of powers doctrine in many other states. If the legislature objects to an executive branch agency's proposed rule, it considers legislation to support the objection. The proposed rule cannot go into effect while the legislature considers that legislation.

When the legislature passes a bill, the constitution requires it to present the bill to the governor for signature. The governor may veto acts of the legislature, although the legislature can override the veto.

Legislative-judicial overlap. The state senate sits as the court for all impeachments of public officers. The state assembly initiates impeachments. The legislature has the power to learn facts upon which legislative choices may depend. It may hold hearings and subpoena witnesses and documents. The legislature can investigate the other two branches, generally acting through its committees. The legislature appoints the state auditor.

Courts usually do not rule on political questions, reserving that task for the legislature. Nor do the courts normally rule on the propriety, practicality, or wisdom of a statute. Courts may only invalidate statutes that violate the constitution.

Executive-judicial overlap. Executive branch agencies may conduct hearings that resemble judicial proceedings. Agencies may hold such hearings to determine if certain facts exist, to grant or revoke licenses, to assess penalties, and to perform other executive acts, subject to judicial review, as long as the hearing officer does not exercise judicial powers.

Summary

The constitution separates the powers of government to avoid concentration of governmental power and to prevent tyranny. The doctrine does not require total separation of powers, but it sacrifices some efficiency in government to ensure that the people will have liberty.

By Steve Miller, Chief
Published by the LRB, Madison WI
http://www.legis.state.wi.us/lrb/GW
No. 7, November 2005

WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON REVIEW OF RECORDS ACCESS OF CIRCUIT COURT DOCUMENTS

FROM: Don Salm, Senior Staff Attorney

RE: Legislative and Judicial Authority

DATE: September 7, 2010

On May 7, 2010, the Joint Legislative Council created the Special Committee on Review of Records Access of Circuit Court Documents. The committee was directed to review how, and by whom, circuit court civil and criminal records may be accessed through the Wisconsin Circuit Court Access website (WCCA). The issues to be considered by the committee include: (a) the length of time a record remains accessible through WCCA; (b) whether accessibility of a record through WCCA should depend on how far a civil or criminal proceeding has progressed; and (c) whether records of proceedings that have: (1) been vacated or dismissed; or (2) resulted in acquittal or other form of exoneration should continue to be accessible through WCCA.

Before the Special Committee begins its deliberations, a threshold question from committee members may be whether the Legislature has any authority to act in a matter that is of substantial significance to the operation of the judicial branch of government (namely, access to electronic court documents and court documents in general). This Memo addresses that question.

BACKGROUND

Separation of Powers

The Wisconsin Supreme Court has held that the state's three branches of government (legislative, judicial, and executive) exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of

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courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another."
>
> Each branch has a core zone of exclusive authority into which the other branches may not intrude....
>
> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." ...The undue burden or substantial interference must be proven beyond a reasonable doubt.... [See *Id.*, 531 N.W.2d at 36, 40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

> ...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separation of powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary's constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary's core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.
>
> If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch. [See *State v. Horn*, 226 Wis. 2d 637, 594 N.W.2d 772, 776-7 (1999); citations omitted.]

STATUTORY RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIAL BRANCHES

Section 751.12 (1), Stats., provides that the Supreme Court must, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. Section. 751.12 (4), Stats., provides that the authority of the Supreme Court to affect the statutes does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."

DISCUSSION

It appears that the subject of access to civil and criminal court documents, particularly through electronic means, is an area over which the legislative and judicial branches exercise shared powers. This is evidenced by the following:

1. The Director of State Courts' authority to develop and implement circuit court automated information systems, which currently includes the Circuit Court Automation Programs (CCAP), under which free electronic access to circuit court records is provided via the WCCA, was created by the Legislature in 1989 Wisconsin Act 31. That Act created s. 758.19 (4), 1989 Stats., which currently reads:

   > 758.19 **(4)** The director of state courts may develop, promote, coordinate and implement circuit court automated information systems that are compatible among counties using the moneys appropriated under s. 20.680 (2) (j). If the director of state courts provides funding to counties as part of the development and implementation of this system, the director of state courts may provide funding to counties with 1 or 2 circuit court judges for a minicomputer system only up to the level of funding that would have been provided had the county implemented a microcomputer system. In those counties with 1 or 2 circuit court judges, any costs incurred to implement a minicomputer system not funded under this subsection shall be paid by the county. Those counties may use that minicomputer system for county management information needs in addition to the circuit court automated information system use.

2. The Director of State Courts' authority to establish a funding mechanism for electronic filing of court documents under CCAP systems created under s. 758. 19, Stats., was created by the Legislature in 2007 Wisconsin Act 20. That Act created s. 758.19 (4m), Stats., which currently reads:

   > 758.19 **(4m)** The director of state courts may establish and charge fees for electronic filing of court documents under the circuit court automated

> information systems created under this section. The secretary of administration shall credit all moneys collected under this subsection to the appropriation account under s. 20.680 (2) (j).

3. The CCAP system, in part, seems to clearly come within the area of "pleading, practice, and procedure" which is central to the shared power and interests of the legislative and judicial branches under s. 751.12 (4), Stats. A clerk of court's CCAP electronic records of active court cases, and of the disposition of those cases, are the same as the records at the clerk of court's office in his or her county (or counties)--they are the official records. Electronic records under CCAP are records the clerk is required to keep under s. 59.40 (2) (b) and (c), Stats., among other provisions. "When a change is made to the underlying hard copy or electronic court record, the change is reflected at all access points to the court record." [Letter from A. John Voelker, Director of State Courts, to Mr. David R. Schanker, Clerk, Wisconsin Supreme Court, dated February 3, 2010, commenting on Supreme Court Petition 09-07.] These records include records relating to various procedural and practice matters, including items relating to the filing of claims and the docketing of judgments, for example.

It appears that the Legislature has the authority to consider and, in part, regulate the court records-related matters that are the substance of this committee's charge.

There is an additional argument for both the legislative and judicial branches being involved in this area of electronic court records. Although history, practice and, perhaps, case law may indicate that, for example, the judiciary has a more compelling legal argument, and a long-term history of protecting its interests in an area that arguably "skirts the line" of "pleading, practice, and procedure," the court cases have recognized that the three branches of government (in this case, the Legislature and judiciary) share authority, must co-exist, and must show each other a certain amount of respect and deference.

For example, in *Rules of Court Case*, 204 Wis. 501, 515, 236 N.W. 717 (1931), the Supreme Court stated that: "As to the exercise of those powers, however, which are not exclusively committed to them [the courts], there should be such generous co-operation as will tend to keep the law responsive to the needs of society." Similar sentiments were expressed in *State ex rel. Moran v. Department of Administration*, 103 Wis. 2d 311, 317, 307 N.W.2d 658, 662 (1981), in which the Court refused to order the Secretary of Administration to purchase an automated legal research system, although he had the duty to do so:

> We think it appropriate to take judicial notice of the shortfall in state revenue caused by current economic conditions. The end of the 1979-81 biennium is fast approaching. If we ordered the secretary to issue a warrant for the amounts requested, they would be charged against the appropriations for the fiscal year 1980-81. Although the total involved...is miniscule compared to the costs of operations to government...we think it a proper exercise of judicial restraint to withhold granting the writ in the instant case. This court is committed to moderation in budgeting the expenses of the judicial branch of government, just as the governor and the legislature are so committed for the executive and legislative branches. [See *Moran*, 307 N.W.2d, at p. 664.]

In *Friedrich*, cited above, the Supreme Court concluded that the Legislature and the judiciary share the power to set fees for court-appointed guardians ad litem and special prosecutors. The Court stated that the judicial branch has the ultimate authority for setting the fees, but in recognition of the shared interest of the Legislature and in recognition of a statute's presumption of constitutionality, the Court stated that any undue burden or a substantial interference with one branch of government by another must be proven beyond a reasonable doubt. The Court stated that this burden is necessary to ensure that the judiciary will order the expenditure of public funds for its own needs only when it articulates a compelling need. [See *Friedrich*, slip opinion, at pp. 15, 19, and 25.]

FINAL NOTE

In case of a conflict between legislative and judicial proposals regarding the shared power of judicial recusal, the final arbiter of course may be the Wisconsin Supreme Court. The Supreme Court can overturn legislative action either through future amendments to the statutes or, in a contested case, by determining, beyond a reasonable doubt, that the legislative action unduly burdens or substantially interferes with the authority of the judicial branch. [See, for example, legislative and judicial activity regarding ch. 756, Stats., relating to juries. In 1990, the Legislative Council established the Special Committee on Jury Service to review jury selection practice. The committee's deliberations resulted in the enactment of 1991 Wisconsin Act 271, relating to jury service as a civic duty, exemptions and excuses for jury service, jury commissioners, sources for jury lists, juror qualification forms, forfeitures for failure to attend as a juror, length of juror service, and periods of juror eligibility. The Supreme Court, apparently not satisfied with the decisions made by the Legislature, significantly amended ch. 756, Stats., in Supreme Court Order No. 96-08, 207 Wis. 2d xv (1997). The Legislature did not respond to the amendments effected by the Supreme Court.]

DLS:wu

IS OUR JUDICIARY A CO-EQUAL BRANCH OF GOVERNMENT?

Dianne Molvig

On April 2, 1874, the state superintendent of public property, who managed the capitol building, fired the Wisconsin Supreme Court's janitor and hired a replacement. When the justices asked the superintendent to reverse his decision in order to keep the former employee, the superintendent refused.

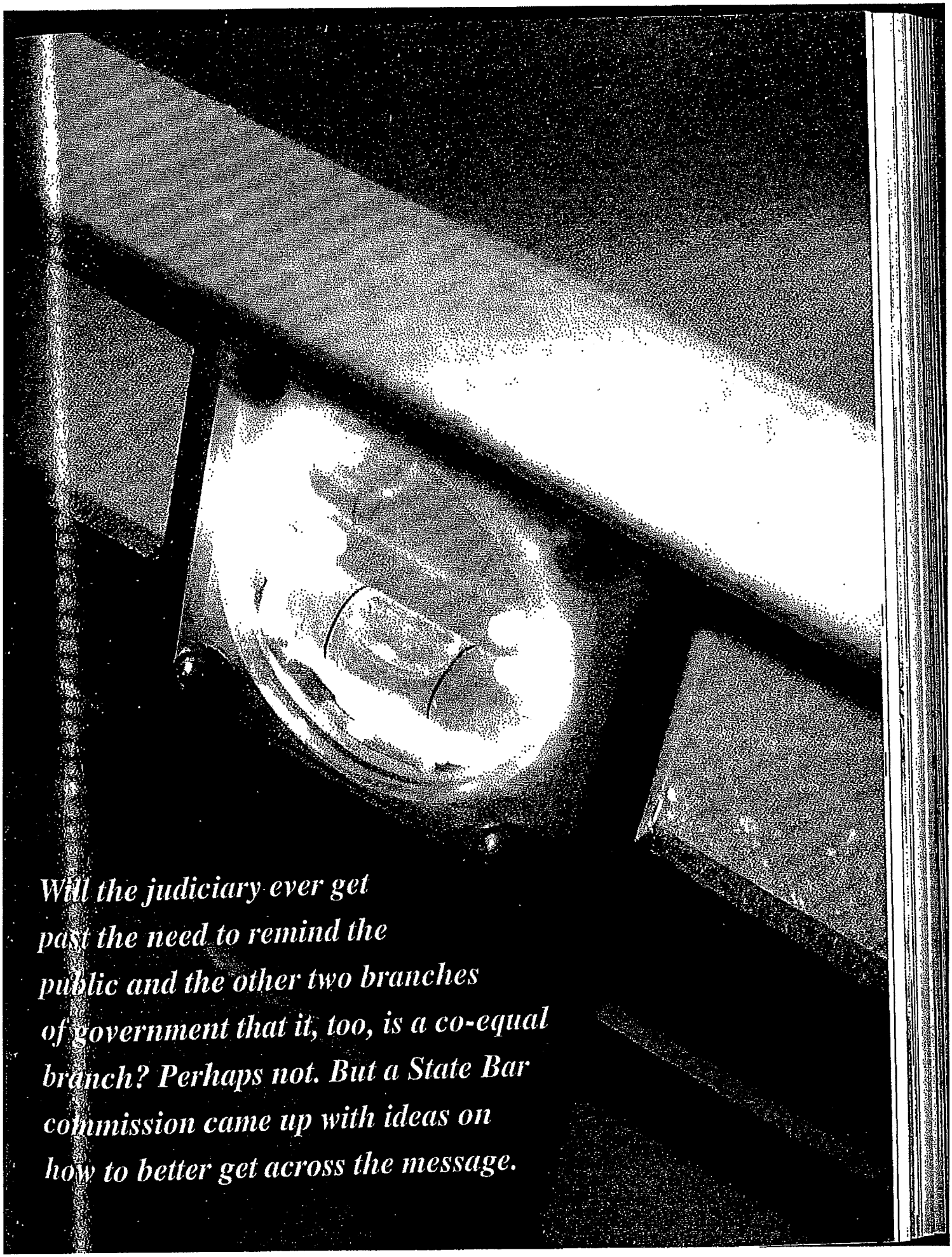
The justices chose to take official action. Within two weeks they had issued a decision, reading in part:

"It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants ... As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the Constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments."[1]

Thus, the court got to keep its janitor. This case may seem trivial by today's standards. But it wasn't the last time the court had to resist attempts by other government branches to usurp judicial authority. More recent examples include:

- Several years ago the Wisconsin Legislature passed a law prohibiting judges from appointing lawyers to represent indigent parents at risk of losing custody of their children in CHIPS proceedings. The Wisconsin Supreme Court ruled that the law violated the federal and state constitutions.[2]
- In 1987 the Legislature took upon itself the authority to require and regulate training for lawyers serving as guardians ad litem in family court actions. The supreme court ruled against the law, stating that it interfered with the court's superintending powers and violated the separation of powers doctrine.[3]

Dianne Molvig operates Access Information Service, a Madison research, writing and editing service. She is a frequent contributor to area publications.



Will the judiciary ever get past the need to remind the public and the other two branches of government that it, too, is a co-equal branch? Perhaps not. But a State Bar commission came up with ideas on how to better get across the message.

I believe the people will be better served by three branches of government that understand each other's functions and communicate with each other in a friendly, cooperative way.


David Saichek


Justice Jon Wilcox

This commission study also was an opportunity to look inward at the operations of the judiciary, its relations with the other branches and how well it is serving the public.

Not all reminders of the judicial branch's independence, however, have come in the form of formal court decisions. When the Department of Administration (DOA) wanted to take over the state courts' computer system a couple of years ago, the supreme court had to point out to DOA, an executive agency, that such a move would be a threat to separation of powers. Therefore, the court graciously but firmly refused to comply. Former Wisconsin Supreme Court Chief Justice Nathan Heffernan discussed the matter in a summer 1995 interview in *The Verdict*, noting, "I think that the main thing that the courts have to be worried about is that they not be treated just as another bureaucracy ... and that under the Constitution they are independent of both the legislature and the governor."

Heffernan's words ring back to what we all heard in grade school civics lessons: Our government has three branches, each independent and equal in stature to the others. History shows that concept needs to be continually refreshed not only in the minds of the general public but in the minds of members of the legislative and executive branches. Toward that end, in 1995 State Bar immediate past president David Saichek established the Commission on the Judiciary as a Co-equal Branch of Government, which recently issued its report and recommendations.

"My reason for appointing the commission," Saichek notes, "is that I believe the people will be better served by three branches of government that understand each other's functions and communicate with each other in a friendly, cooperative way. I also had the perception that in some cases the other branches have treated the courts like an agency of state government. It's not an agency; it's a co-equal branch of government."

"I think there's concern as to just where the judiciary stands," agrees Wisconsin Supreme Court Justice Jon Wilcox, who cochaired the commission with Saichek. "But this [commission study] also was an opportunity to look inward at the operations of the judiciary, its relations with the other branches and how well it is serving the public."

A fresh look

The 33-member commission had two purposes:

1) to research the historical and current framework of the separation of powers doctrine; and

2) to explore ways the courts can properly maintain their independence while cooperating with other branches of government, toward the goal of serving Wisconsin citizens with basic good government.

"What we tried to do," Saichek explains, "was take a fresh look at the separation of powers doctrine as it exists today, because certain changes have been made in that doctrine which now make cooperation among the three branches of government a more realistic goal. I think that's an advance in jurisprudence, in which Wisconsin is on the leading edge."

At the outset, the commission realized its work had to have solid footing in legal and constitutional history. Therefore, the commission set up a research subcommittee, whose task was to create "the platform from which the other subcommittees made their recommendations," says Milwaukee attorney Walter Kelly, who cochaired the research subcommittee with Gary Sherman, Port Wing attorney and State Bar past president.

The research subcommittee's section of the report drives home two key points about the separation of powers doctrine. First, the doctrine exists not to protect governmental turf, but to safeguard individual liberty by diffusing power among three branches, rather than concentrating it in one. Second, the Wisconsin Constitution is even more specific in spelling out judicial powers than is the U.S. Constitution. "Wisconsin's is a strong judicial branch constitution," Kelly points out, "and that has been a developmental and evolutionary process over the years."

That said, history also shows that the judiciary has on occasion deferred to the other government branches, in the interests of cooperation between branches and better government for the state's citizens. "There's no effort by the judiciary in this state," Kelly says, "to drive the other branches to the wall. Sometimes the court will choose, even in an area where it has considerable power, to defer to either the legislative or the executive branch or both. I would call that a form of interbranch diplomacy."

"The trick," Kelly adds, "is to have that kind of diplomacy without surrendering ultimate bottom-line power. For all the talk about cooperation among branches, the final word on separation of powers issues in Wisconsin clearly remains with the supreme court."

With such concepts as a framework, the other commission subcommittees set to the task of drawing up recommendations in four areas: interbranch relations, court-community collaboration, court accountability, and funding and allocation of resources.

Interbranch relations

A certain tension between branches of government perhaps always will exist. In fact, it may be a crucial ingredient in a system based upon three branches keeping one another in check, assuring no one branch exceeds or misuses its powers. Yet, cordiality and respect must exist alongside interbranch scrutiny, or all of government suffers as ultimately do its citizens.

The interbranch subcommittee looked at ways to "build the trust level," says Regina Frank-Reece, commission member and director of the Office of Management and Budget in the Division of Juvenile Corrections. "I think we all realize that our work is interdependent, and that we can have better government if we learn how to work together better."

Frank-Reece describes her subcommittee's recommendations as "very commonsense sorts of things." But she adds, "in

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my experience – which has always been in the executive branch – these just don't happen. One of the challenges is: How do we improve communications?"

The subcommittee came up with the following possibilities:

1) *Formal communications* should be developed among the three branches and all levels of government to foster better understanding of their functions, needs and problems, including:

- presentation of the annual state of the judiciary speech directly to the legislative and executive branches;
- orientation programs for new legislators and new judges that address the roles and responsibilities of each other's branch;
- materials and information on the judicial branch to be included in orientation programs for new legislators and in interbranch conferences;
- materials and information on the legislative branch to be included in orientation programs for new judges and in interbranch conferences;
- expansion of the Judicial Ride-Along Program;
- interbranch conferences; and
- joint study committees and task forces.

Although diverse, the above suggestions all aim toward the same result: improved understanding among the branches of what other branches do – and why and how they do it.

Of these recommendations, one of the simplest to implement may be the first on the list. Currently, the supreme court chief justice delivers the "state of the judiciary" speech to judicial colleagues at the annual Judicial Conference. The impact may be comparable to "preaching to the choir."

"As it is now the [state of the judiciary] speech is printed and circulated to members of the other branches," notes Linda Clifford, Madison attorney and chair of the interbranch relations subcommittee. "But there's nothing like being in the same room together and listening to the speech. That would give it a higher profile than it gets now."

Sharing information is an element running through all the above recommendations. Another common thread is facilitating personal connection to promote communication among branches. "All branches are operated by people," Clifford says. "You can have tools to make communication easier, or more routine or more expected. But it's people who have to carry that out and do it with sincerity."

2) *Informal communications*, such as regular meetings and discussion groups for branch leaders at the state, county and local levels, should be encouraged and fostered to improve understanding of the functions, needs and problems of each branch.

In addition to formal meetings and conferences, the subcommittee cites the value of informal gatherings of members of different government branches. "It can be as informal as having breakfast once a month," Clifford explains, "without having any agenda – just talking about ideas and getting to know people. That keeps the lines of communication open. And it humanizes the issues."

Supreme Court Chief Justice Shirley Abrahamson already has initiated various efforts to informally bring together people from different branches. Likewise, circuit court judges in some counties have made efforts to build friendly relationships with their local government officials. Still, some judges are wary, fearing that efforts to reach out to other branches may be perceived as playing politics.

While the commission recognizes that as a valid concern, it also emphasizes that this concern should not preclude advocating for the judiciary. What's more, if friendly interaction is ongoing, it's far less likely to be construed as politically motivated. "If we can establish formal and informal relationships over time," Frank-Reece points out, "and not just during the biennial budget process, then everybody will be better served. It makes sense that if people are talking to each other on a more frequent basis, there will be better understanding of the judicial branch's needs and perspective."

3) *Institutional mechanisms*, such as judicial checklists, judicial impact statements and joint reports, should be developed cooperatively by the three branches of government to improve the process of legislative drafting and to measure and report on the effect of legislation on the court system.

The mechanisms mentioned here are tools for preventing problems. Judicial checklists could help legislators draft a bill in a way that averts legal conflicts down the road. Judicial impact statements, on the other hand, come along later in the process. For instance, if the Legislature passes a new "get tough on crime" law, a judicial impact statement can assess: What will this law do to the courts? Will it create new burdens the courts won't have the resources to handle? "We'd like to give the Legislature more opportunity to think that through," Clifford points out. "Whether they choose to address that remains up to them. This recommendation just does half the job."

Court-community collaboration

Better understanding of the judiciary among those in government is but one piece of the puzzle. Equally important, the commission emphasizes, is public awareness of the judicial branch. The workings of the judiciary are mostly outside the public spotlight, except for certain notorious trials. The upshot: The public's perception of the courts often is either nonexistent or grossly skewed.

Court-community collaboration works both ways: It's vital to an accurate public view of the judiciary and to the courts truly serving their "customers," the citizens. "Lawyers are a critical part of this process," says Mary Lynne Donohue, Sheboygan attorney and chair of the court-community collaboration subcommittee. "The community can't do it alone; the judiciary can't do it alone. Lawyers, out of honor for their

Public awareness of the judicial branch through court-community collaboration is vital to an accurate public view of the judiciary and to the courts truly serving their 'customers,' the citizens. Lawyers are a critical part of this process.

Mary Lynne Donohue

Patricia Helm

I think there's potential merit when the court needs to go to the Legislature for additional monies for facilities, judges, personnel and so on, to be able to say, 'We have objective measurements and here's why we need such-and-such.'

We'd like to give the Legislature more opportunity to think through [how new laws impact the judicial system]. Whether they choose to address that remains up to them.

Linda Clifford

Regina Frank-Reece

If we can establish formal and informal relationships over time and not just during the biennial budget process, ... there will be better understanding of the judicial branch's needs and perspective.

profession, are an important part of implementing these recommendations." The recommendations include:

1) *The State Bar of Wisconsin should support the Wisconsin Supreme Court's community involvement projects, including its "Volunteers in the Courts" project.*

Noting Chief Justice Abrahamson's proactive stance in this area, the subcommittee called upon Bar members to get actively involved in supreme court projects.

2) *The Local Bar Grant Committee should encourage local bar efforts to make their courthouses user-friendly.*

The State Bar funds small grants to local bar associations for public education. The commission suggests funneling some of these funds into projects that help people find their way through the court system. Ultimately that leads to better understanding of the court's function in society.

3) *The State Bar's Law-related Education Committee and Videotape Committee should develop a videotape and study materials to explain the judicial system and its relationship to the other branches of government for distribution to schools.*

A well-done videotape could introduce a realistic image of the judiciary at a young age and help bring students' civics lessons to life.

4) *The State Bar should increase its support for local bar efforts to enhance community understanding of the judiciary's role as an equal branch of government by:*

- providing program information at the local bar leaders' conference; and
- providing increased opportunity for bench/bar interaction at bar conferences.

Local efforts are key to creating awareness of the judiciary. Through informational and conference programs, the State Bar can support local efforts.

5) *The State Bar should continue its commitment to the work of its Cable and Broadcast Committee, which is educating the public about the role of lawyers and the judicial branch.*

This project was launched last year by then president David Saichek. The program "Law Talk" now is shown on Milwaukee and Madison cable stations and soon will be broadcast statewide.

Court accountability

Proclaiming co-equal status is little more than talk if the judiciary can't demonstrate it is effectively serving the people. "A lot of what we have now is word-of-mouth stories, some true, some untrue," says Patricia Heim, La Crosse attorney and chair of the court accountability subcommittee. "It's hard to actually state with any certainty that a court system has been reviewed and that it's performing to meet standards. We wanted to come up with concrete measurements."

Some might argue that accountabilities for the judiciary already abound: elections, codes of ethics, media scrutiny, to name a few. Why does the commission feel compelled to add more? Heim contends that far from being a burden on the judiciary, new accountabilities based upon objective measures will be a boon to the courts' cause.

"I think there's potential merit," Heim says, "when the court needs to go to the Legislature for additional monies for facilities, judges, personnel and so on, to be able to say, 'We have objective measurements and here's why we need such-and-such.'"

Currently, such negotiations mostly come down to looking at court case-counts. But objective measurements would assess quality of the system, providing "concrete evidence to show whether the system is working or not working," Heim says. "That will take this process out of the number-crunching and elevate it to another level. It also takes it out of the realm of thinking of the judiciary as just another state agency, where the emphasis is on the bottom line."

The recommendations are:

1) *The supreme court should hold court commissioners to the same standards of conduct, education, performance and reporting as the judiciary.*

Often citizens' only contact with the court system is with court commissioners, who are not elected by the public. The commission recommends that court commissioners be subject to regular and objective evaluation, and that they pursue continuing judicial education.[4]

2) *The supreme court should create a task force on the Quality of the Court System comprised of judges, attorneys, legislators and citizens to consider a methodology for judicial assessment and improvement using the Trial Court Performance Standards and Measurement System.*

Creating a measurement tool from scratch would involve years of work. Fortunately, a project of the National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice has already invested the time and effort. Their Trial Court Performance Standards and Measurement System has been developed and tested in several states. The commission suggests that some of the 68 standards in the Measurement System be implemented in pilot projects in selected judicial districts.

The commission also suggests that the task force explore whether Total Quality Management (TQM), or certain aspects of this evaluation system, are applicable in Wisconsin. TQM is being used by courts in Minnesota, Connecticut, New Jersey, Maryland and Maine.

3) *The* Wisconsin Lawyer *editorial board should consider establishing a monthly column about issues of concern to the bar and the judiciary, including the functioning of the court system.*

This column could be a forum for discussion of concerns about the court system. "This would be a great way for either a judge or lawyer to pose an issue or question and have a response from the other side," Heim explains.

4) *The judiciary should take a leadership role in educating the public about the court system, including sponsorship of public forums and participation in educational programs.*

5) *The judiciary should work cooperatively and proactively with the media to educate the public about the effect of*

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Co-equal

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decisions by legislative and executive branches on the judicial branch.

Recommendations 4 and 5 speak to the need for public education about the judiciary – a need that surfaced in other portions of the commission's report. These recommendations tie into accountability as well. "I think education can only help," Heim says. "When people know more about the court system, they feel more assured about it."

Funding and allocation of resources

Funding is a chicken-and-egg issue for the courts. Adequate funding is an indicator that the other branches, and the public at large, value the judiciary's role and deem it a co-equal branch. At the same time, adequate funding is crucial if the judiciary is to function well enough to earn co-equal stature in others' eyes.

The commission refrained from simply calling for more money for the courts – although numerous stories of funding shortages surfaced in the public hearings held in Green Bay, La Crosse, Wausau, Milwaukee and Madison. Rather, the funding subcommittee undertook the gargantuan task of better understanding the state budget process. It also suggested steps to assure the courts get the funds they need. In addition to recommending that the State Bar and the judiciary itself actively educate the public and other branches of government about the courts' needs, the commission recommended:

Walter Kelly

Sometimes the court will choose, even in an area where it has considerable power, to defer to either the legislative or the executive branch or both. I would call that a form of interbranch diplomacy. The trick is to have that kind of diplomacy without surrendering ultimate bottom-line power.

1) *The State Bar should support the Wisconsin Supreme Court's efforts to reallocate judges throughout the state based upon caseload need.*

This is not about massive reorganization, but simply states that when circuit court judges' caseloads allow, they should step in to help other districts having a caseload crunch. "When I sat as a judge in Waushara County, each judge in that district had to take a certain number of cases in another jurisdiction," notes Supreme Court Justice Jon Wilcox, commission cochair. "I think that's a reasonable expectation. We need that kind of flexibility because it allows optimum use of the judiciary."

2) *Judicial compensation should be taken out of the political process by creation of a Judicial Compensation Commission comprised of members of the public and of the three branches of government.* Until the commission is established, an Advisory Committee to the Legislature's Joint Committee on Employment Relations on judicial compensation should be established.

3) *The supreme court should consider the advisability of submitting its budget directly to the Legislature, in addition to submitting it to the executive branch.*

Recommendations 2 and 3 aim to drive home the key point of this report: The judiciary is a co-equal branch. That point becomes clouded by current practices in which judicial salary negotiations become political haggling. And the judiciary budget is submitted to the Legislature as part of the executive branch budget, further feeding the perception that the court is just another state agency.

"As someone who worked in the state budget office and through my interactions with folks in the Legislative Fiscal Bureau," says commission member Frank-Reece, "my sense is that is sometimes how [the judiciary] becomes perceived." Directly submitting the judiciary budget to the Legislature instead would reinforce the message "that the judiciary is a separate entity," Frank-Reece points out. "It would be very symbolic."

Endnotes

[1]*In re Janitor of Supreme Court,* 35 Wis. 410 (1874).

[2]*Joni B. v. State of Wisconsin,* 202 Wis. 2d 1, 549 N.W.2d 411 (1996).

[3]*State ex rel. Fiedler v. Wisconsin Senate,* 155 Wis. 2d 94, 454 N.W.2d 770 (1990).

[4]For more on court commissioners, see *Expanding the Use of Court Commissioners,* 70 Wis. Law. 10 (Feb. 1997). ■

Page 14: History shows that the co-equal concept of government continually must be refreshed in the minds of the public and members of the executive and legislative branches.

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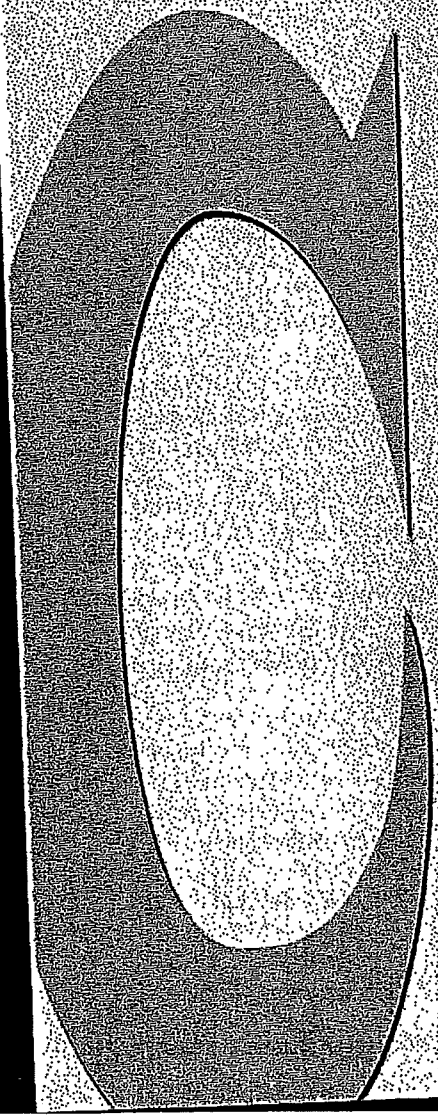
FEATURES

DEPARTMENTS

United States v. Shabaz:

Colliding Branches of Government

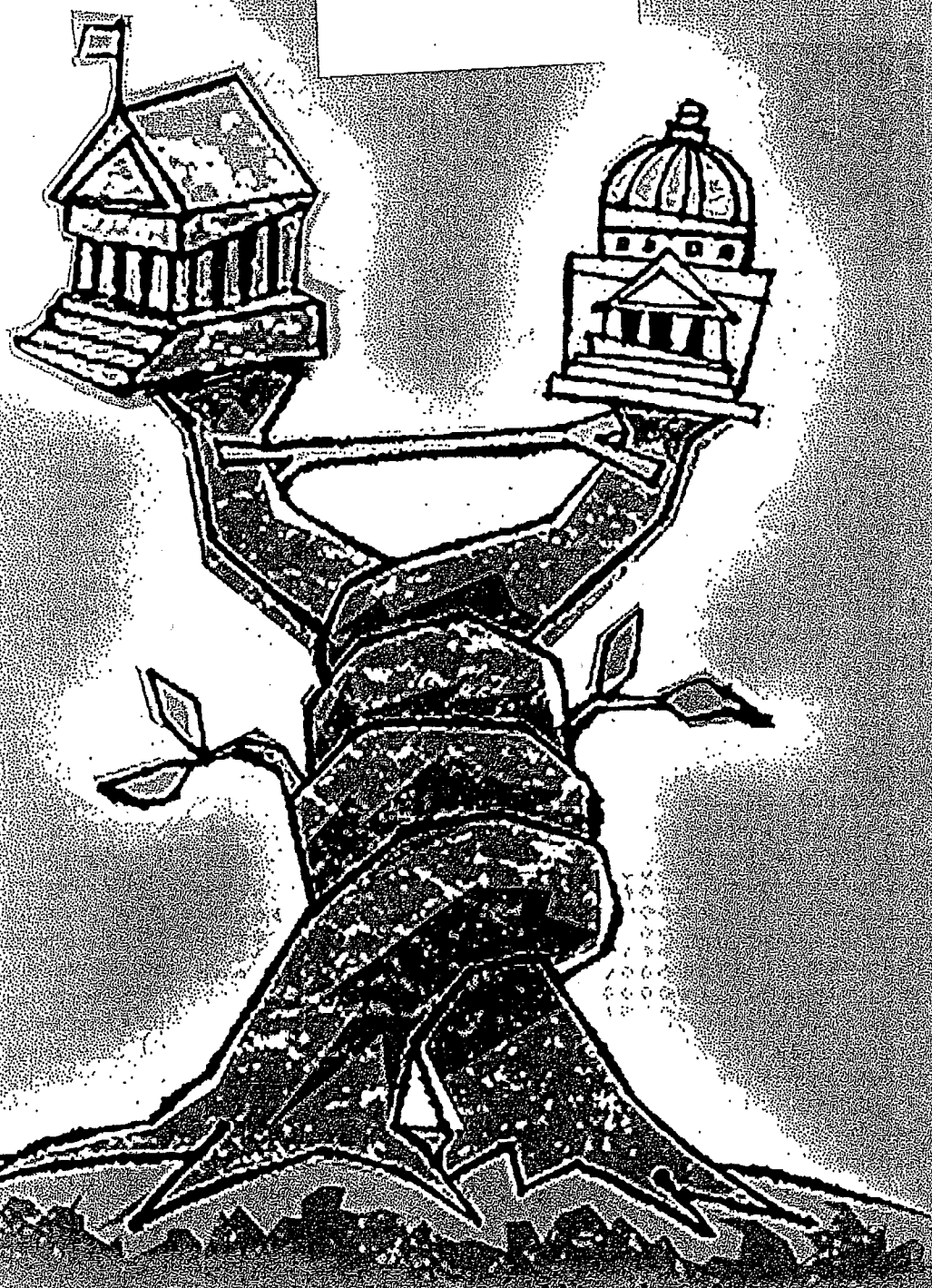
by Frank M. Tuerkheimer



Collisions between the various branches of government, separated 220 years ago both to provide for a workable government and to avoid the risk of tyranny, occur from time to time. A review of a recent decision by the U.S. Court of Appeals for the Seventh Circuit reveals that a recent collision between the branches occurred in Wisconsin just a few months ago, in *United States v. Shabaz*.[1] This collision arose when the executive branch asserted its right to decide what charges should be presented and the judicial branch asserted its right to ensure that its prerogatives on sentencing were not impermissibly constrained. Prosecution and sentencing are, quintessentially, executive and judicial functions, respectively. *United States v. Bitsky*, which became *In re United States of America* in the Seventh Circuit,[2] presents a common scenario but one in which each party dug in its heels. I have dealt with this issue both as a practicing attorney[3] and as an academic.[4] Hence I followed the Wisconsin case with more than a passing interest. Ironically, had this scenario taken place just a few weeks later the result might have been entirely different.

The Collision

Constitutional confrontations between the different branches of government often have their origins in small places. In this case, the origin is the Adams County jail. On Feb. 11, 2001, Steven Vosen was arrested and brought to the jail for booking. He was drunk and cursed at Kenneth Bitsky, an Adams County undersheriff. Bitsky slammed Vosen into a wall. Vosen suffered cuts to his face and head: minor, but demonstrable



The separation of powers into three co-equal branches of government provides us with a system of checks and balances. But what happens when the branches collide? Which branch prevails? Read how the U.S. Court of Appeals for the Seventh Circuit recently made that determination in a case that weighed the powers of the executive and judicial branches.

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injuries. Bitsky then attempted to persuade another officer to write a false report and threatened a second officer to not tell what she had seen during the incident. Bitsky subsequently was charged by a grand jury in the Western District of Wisconsin in a three-count indictment: one count alleged a violation of the Civil Rights Act based on Bitsky's handling of Vosen; and two counts charged an obstruction of justice with respect to Bitsky's attempts to cause a false report to be written and to intimidate a colleague.

Shortly before the scheduled trial was to begin before Judge John Shabaz on April 14, 2003, the U.S. Attorney's Office for the Western District of Wisconsin and the attorney for Bitsky reached a plea agreement. Bitsky was to plead guilty to one of the obstruction counts, and the United States was to move to dismiss the remaining charges after sentencing. Under federal procedure, the prosecution does not have the unfettered power to dismiss a criminal charge once it has been brought; it must obtain the approval of the court.[5] Each of the three counts of the indictment carried a maximum penalty of 10 years' imprisonment. However, the Federal Sentencing Guideline range for the obstruction charge was substantially less than the guideline range for the Civil Rights Act violation. Judge Shabaz conditionally accepted Bitsky's plea of guilty to one of the obstruction counts pending receipt of the presentence report. A sentencing hearing was scheduled.

At the sentencing hearing Judge Shabaz rejected the plea agreement, which he had the power to do under U.S. Sentencing Guidelines 6B1.2(a). Judge Shabaz rejected the agreement because it was his view that the plea agreement undermined the sentencing guidelines, since the plea agreement precluded him from imposing the higher sentence he thought was warranted, given Bitsky's conduct. Judge Shabaz's refusal to accept the plea agreement resulted in an adjournment of the sentencing. At the adjourned date Bitsky informed the court that he intended to proceed to sentencing without a plea agreement. Judge Shabaz then sentenced Bitsky to a term of 16 months imprisonment on the obstruction count to which he had pleaded guilty, and scheduled trial on the remaining counts to take place in approximately three weeks.

The following day the government filed a motion under Rule 48(a) of the Federal Rules of Criminal Procedure to dismiss the remaining two counts. Included with the motion was an affidavit of Assistant U.S. Attorney John Vaudreuil that explained that the decision to accept the guilty plea to one count was to satisfy the principal prosecution goal to ensure a felony conviction of Bitsky, which carried with it the certainty that Bitsky would have to resign from his position and no longer work in law enforcement. According to Vaudreuil, this end would be obtained without the risk of a trial, which might result in an acquittal on all counts.

Two days later Judge Shabaz granted the motion to dismiss with respect to the other obstruction count, but denied it with respect to the Civil Rights Act count, characterizing that proposed dismissal as "a sweetheart deal" that was not "a reasonable resolve of this case." Judge Shabaz did not address the standard for dismissal under Rule 48(a) but, rather, relied on the sentencing guidelines, even though the plea agreement was no longer before the court. Judge Shabaz concluded that when the 24-to-30 months Guideline range for the Civil Rights Act count was compared to the sentence on the obstruction count (16 months), it was clear that the obstruction count did not reflect the seriousness of the offence behavior. Judge Shabaz, in denying the Rule 48(a) motion to dismiss, said he would follow the intent of the Guidelines "until so directed otherwise by a higher authority than the Department of Justice." He noted that the government was concerned with the risk of trial and then, with obvious sarcasm, stated that "if that is the case it should withdraw from litigation for all trials have the potential of risk."

The Result

Where are we now? We have one obstruction count under which Bitsky has been sentenced and another has been dismissed. That leaves the most serious charge as the open charge, the Civil Rights Act count, which Judge Shabaz wants prosecuted and which the government wants dismissed.

Judge Shabaz then issued an order that the remaining count be tried, but AUSA Vaudreuil advised the court that the government did not intend to proceed to trial on the open count. The following day, in a hearing before Judge Shabaz, the government reiterated its position and Judge Shabaz stated that the government's request to dismiss the open count was in bad faith:

"The United States Attorney is clearly motivated solely by a desire to usurp the court's sentencing authority. ... That purpose is clearly contrary to the public interest and a bad faith exercise of his authority. Were the government allowed to dismiss count 1 of the indictment the public interest would not be served."

That same day Judge Shabaz entered a one-page order appointing a private attorney as "special counsel to prosecute the defendant on count 1 of

the indictment." Judge Shabaz also ordered the Department of Justice to pay the expenses of the special counsel.

The appointment of an outside special prosecutor raised an entirely separate set of issues. While there have been court-appointed special prosecutors under the Independent Counsel legislation following the Watergate scandal, in each instance in which a special prosecutor or independent counsel was judicially appointed, appointment was pursuant to authority given to the courts by Congress, triggered by the initiative of the U.S. Department of Justice. The constitutionality of this process was upheld by the U.S. Supreme Court in *Morrison v. Olson*.[6] The practical ramifications of a pure outsider being appointed to prosecute are extraordinary. For example, is the executive branch required to turn over its file to this person to assist this person in prosecuting a case that the executive branch has decided should not be prosecuted? To what extent can such a person comply with the requirement to turn over exculpatory evidence if this person has something less than full access to the Justice Department files, and why should such access be given in the first place to implement a prosecution that the department feels should not go ahead? If there is a motion to dismiss or any other litigation, is this person acting on behalf of the United States per the caption or pursuant to his or her personal concept of what the law should be? Finally, of course, the end result is that if there is to be a trial, as was contemplated here, the trial would be before none other than the judge who appointed the special prosecutor in the first place precisely for the purpose of continuing the prosecution. While not a kangaroo court, this is not exactly the traditional setting in which a criminal defendant finds himself or herself.

Had Judge Shabaz not appointed a special prosecutor, the open count simply could have languished until the speedy trial provision of either Rule 48(b) or the Sixth Amendment to the U.S. Constitution would have compelled a dismissal of the charge. With the appointment, however, that option was precluded. The prosecution view that certainty of a felony conviction was essential and the court's view that its sentencing prerogative could not be curtailed were now in a head-on collision. The government brought a writ of mandamus before the Seventh Circuit.

After an initial series of filings, the Seventh Circuit invited either Judge Shabaz or the appointed special prosecutor to respond, if either wished, to the mandamus petition. Judge Shabaz chose to act on his own behalf. Judge Shabaz said that he denied leave to dismiss the open Civil Rights Act count because that dismissal was "a transparent attempt to circumvent the court's sentencing authority." Judge Shabaz continued that the case presented the question of the proper balance of power between prosecutorial discretion and the sentencing authority of the judiciary. He then stated the issue as whether a motion to dismiss pursuant to Rule 48(a) may be denied when advanced for the sole purpose of circumventing the rejection of a plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure and the sentencing guidelines. Judge Shabaz saw that a resolution of the issues required a consideration of the relationship between the powers of the two branches of government.

The prosecution, however, did not look at the scenario from the vantage point of sentence, but rather as a simple question as to who could decide whether a prosecution should continue. This question required a focus on Rule 48(a), which on its face is a judicial constraint on the government's ability *not* to prosecute. According to the government, a judge can deny a Rule 48(a) motion only if the government's purpose in seeking the dismissal is to harass the defendant. For example, if the dismissal were granted and the prosecution were reinstated, that continued process would certainly constitute harassment of the defendant, which the court, under its Rule 48(a) power, could prevent by denying the dismissal. Absent such harassment of the defendant, the government claimed, the court has no authority under Rule 48(a) to interfere with the determination to discontinue a case.

As to his appointment of a special prosecutor, Judge Shabaz argued that the authority to deny a Rule 48(a) motion to dismiss inherently had to include the authority to appoint special counsel to compel prosecution, because in the absence of such authority the denial would be meaningless. His only cited authority on this point was *Young v. United States*,[7] a contempt of court proceeding in which the court indeed appointed a special counsel to handle a contempt charge, based on the long-standing principle that courts had the power to protect the integrity of their orders. Judge Shabaz shifted the focus, however, from ensuring the integrity of court orders – the subject of a contempt charge in *Young* – to the ability of the court to defend the integrity of its powers under the Sentencing Guidelines.

Judge Shabaz's submittal was made on Aug. 28, 2003. The court's decision followed on Sept. 16, 2003. A three-judge panel composed of Judges Posner, Easterbook, and Wood considered the government's mandamus petition, in a decision written by Judge Posner. Judge Posner immediately noted why the contempt authority that Judge Shabaz relied on in citing *Young v. United States* was different. The theory permitting the judiciary to prosecute contempt was that the judiciary should not be dependent on the executive to assure compliance with its orders. In this case, however, Judge Posner noted, no judicial order was flouted; rather, the district court was telling the prosecution which crimes to prosecute. And as long as these were not crimes against the judiciary, according to Judge Posner, Judge Shabaz "stepped outside the boundaries of his authorized powers."

Judge Posner observed that under Rule 48(a), the court's permission was required to dismiss a charge. He noted, however, that the rule's principal

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purpose was to protect the defendant from government harassment, something not in issue here. He then went to the heart of the matter: the government wanted to dismiss the civil rights count with prejudice and Judge Shabaz disagreed with that exercise of prosecutorial discretion. Judge Posner acknowledged that Judge Shabaz thought the government had exaggerated the risk of losing trial and, in Judge Shabaz's words, "the evidence was strong and conviction extremely likely." In what is perhaps the most caustic part of his opinion, Judge Posner observed that Judge Shabaz "is playing U.S. attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person."[8]

Since Judge Shabaz had made a finding that the prosecution was acting in bad faith (namely it was using its executive powers in an effort to circumvent the sentencing powers of the judiciary), Judge Posner then turned to the question of bad faith. He found no appellate decision that actually upheld the denial of a motion to dismiss on the basis of prosecutorial bad faith. Judge Posner was not surprised because bad faith was not a parameter that the court could take into account in assessing the conduct of a cobranch of the government. Judge Posner noted that the prosecutory power of the executive branch in conjunction with the legislative power of Congress assured that no one could be convicted of a crime without the concurrence of all three branches. "When a judge assumes the power to prosecute the number shrinks to two."[9]

Conclusion

The Seventh Circuit Court of Appeals granted the government's mandamus petition and ordered Judge Shabaz to grant the government's motion to dismiss the civil rights count against Bitsky and to vacate the appointment of the special prosecutor.[10] The unambiguous message of this litigation is that when it comes to decisions to drop existing charges, unless the dropping of the charge is part of a harassment scenario, the judiciary must defer to the executive. However, the issue probably will not arise again in the near future.

On Sept. 23, 2003, one week after the Seventh Circuit's decision, U.S. Attorney General John Ashcroft issued a memorandum to all federal prosecutors setting forth departmental policy concerning the charging of criminal offenses and the disposition of charges and sentencing. The crux of the memorandum is that in all federal criminal cases prosecutors must charge and pursue the most serious readily provable offense or offenses that are supported by the facts unless

an assistant attorney general or designated supervisory attorney authorizes otherwise. The most serious offenses are defined as those generating the most substantial sentence under the Sentencing Guidelines. A charge is not readily provable if the prosecutor has a good faith doubt for legal or evidentiary reasons as to the government's ability to readily prove a charge at trial. If that is the situation, the charges should not be filed. Once filed, the most serious readily provable charge may not be dismissed except as permitted by an assistant attorney general or a designated supervisory attorney.

Unless one were to perceive of the relatively minor injuries Bitsky inflicted on Vosen – minor when seen on the spectrum of classical cases under the Civil Rights Act – as taking the case into the realm of the not readily provable, the application of the Ashcroft memorandum to the facts of the Bitsky case would make it impossible for the prosecution to enter into the plea agreement that was entered into here. In this post-Ashcroft memorandum scenario, there never would have been the collision between court and prosecution that led to the mandamus litigation and ensuing decision. So, juxtaposed with great constitutional principles, is the vastly more mundane but often overriding concept that timing is everything.

Endnotes

[1] As captioned by the government in its petition for a writ of mandamus.
[2] *In re United States of America*, 345 F.3d 450 (7th Cir. 2003).
[3] *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).
[4] Frank M. Tuerkheimer, *Prosecution of Criminal Cases: Where Executive and Judicial Powers Meet*, 25 Am. Crim. L. Rev. 251 (1987).
[5] Fed. R. Crim. P. 48(a).
[6] 487 U.S. 654 (1988).
[7] 481 U.S. 787, 801 (1987).
[8] 345 F.3d at 453.
[9] *Id.* at 454.
[10] This result is identical to the outcome in *United States v. Cowan*, cited supra n.3, which I litigated almost 30 years earlier on behalf of the U.S. Department of Justice. There is no intervening precedent to the contrary.

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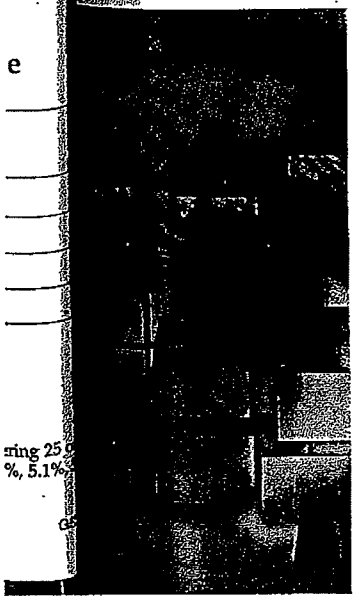
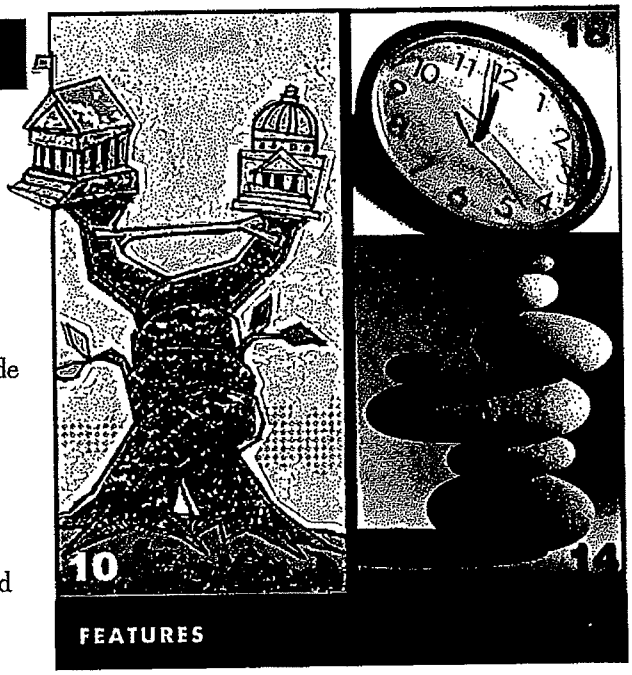
COVER

6 TROUBLE AHEAD: WISCONSIN'S NEW DOMESTIC ABUSE LAWS

The budget repair bill included provisions that expand the coverage of restraining orders to include individuals who are in "dating relationships" and create a new evidentiary privilege that covers communications between domestic abuse victims and victim advocates and the victims' family members. These significant changes to Wisconsin's civil and criminal laws on domestic abuse pose challenges to practitioners and courts alike.

By John A. Birdsall





FEATURES

10 *UNITED STATES V. SHABAZ*: COLLIDING BRANCHES OF GOVERNMENT

The separation of powers into three co-equal branches of government provides us with a system of checks and balances. But what happens when the branches collide? Which branch prevails? Read how the U.S. Court of Appeals for the Seventh Circuit recently made that determination in a case that weighed the powers of the executive and judicial branches.

by Frank M. Tuerkheimer

14 BALANCING PUNITIVE DAMAGES: HOW MUCH IS TOO MUCH?

In a postverdict review of punitive damages in the wake of *Campbell* and *Trinity*, the authors examine how to balance the ratio of punitive to compensatory damages and the reprehensibility of the defendant's underlying conduct in determining how much is too much.

by Robert L. Gegios & William E. Fischer

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