FILED

MAR 7, 2001

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

SUPREME COURT OF WISCONSIN

In the Matter of the Amendment of the Rules of Civil Procedure and the Rules of Appellate Procedure: Wis. Stat. §§ 801.58(7) and 808.08; Internal Operating Procedures of the Supreme Court and the Court of Appeals - Right of Substitution of Judge on Remand

ORDER
No. 00-10

On January 16, 2001, the court held a public hearing on the petition filed on August 31, 2000, by the Director of State Courts seeking amendment of Wis. Stat. §§ 801.58 (7) and 808.08, the Supreme Court Internal Operating Procedures, and the Court of Appeals Internal Operating Procedures, to require an appellate court remanding a case to a lower court to state whether the party has a right to request substitution of a judge. The court has considered the petition and matters presented at the public hearing.

IT IS ORDERED that the petition is denied.

Dated at Madison, Wisconsin, this _____ day of March, 2001.

BY THE COURT:

Cornelia G. Clark
Clerk of Court

SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE *(dissenting)*. I do not think the court should deny this petition without explanation. An explanation is important not only for the petitioners in the present case but also for preserving institutional memory should this issue arise in some form in the future.

Rather than deny the petition, I would hold the petition in abeyance. I would ask the chief judges to consider the issues raised at the hearing on this petition and at the court's open administrative conference so that the chief judges might determine whether to modify the proposed rule or withdraw it.

The following issues were raised at the hearing and conference:

> 1. The need for a rule remains in doubt. The justices question the need for an express statement by an appellate court in each case that substitution is or is not a matter of right because members of the court stated that in most remanded cases, the parties have a right to request substitution of the judge. On the other hand, the chief judges apparently conclude that although in only a few cases will the right of substitution be in doubt, the issue should be resolved by an appellate court rather than the circuit court.
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> 2. The State Bar of Wisconsin objected to the proposed rule because it does not give counsel an opportunity to be heard on the right of substitution.
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> The Litigation Section of the State Bar of Wisconsin objected to the proposed rule on the same grounds as the State Bar. Counsel did, however, advise the court that the preference was that an appellate court, rather than the circuit court, decide the issue of the right to substitution and that after the appellate decision each party may decide at the

circuit court level whether it wishes to exercise that right. Counsel recognized that two issues exist that should be treated separately: (1) the legal question of the right to substitution and (2) the party's discretion to exercise the right to substitution.

3. Several justices expressed concern about when an appellate court would decide the right to substitution and whether any such decision might interfere with the return of the record, motions for reconsideration, and the statutory provisions (especially the time requirements) relating to a party's exercise of the right to seek substitution at the circuit court.

A member of the court of appeals set forth an analytical frame for considering the proposed rule.

In determining whether a right of substitution exists, an appellate court is deciding a legal question, that is, it must apply Wis. Stat. § 801.58 and State ex rel. J.H. Findorff v. Milwaukee County, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679, to its own opinion. An appellate court's decision about the right of substitution is limited to the issues for which the case is remanded. Further issues may develop on remand that raise the issue of the right of substitution. On remand to the circuit court the parties may decide whether to exercise their right of substitution.

For the reasons set forth, I write separately.